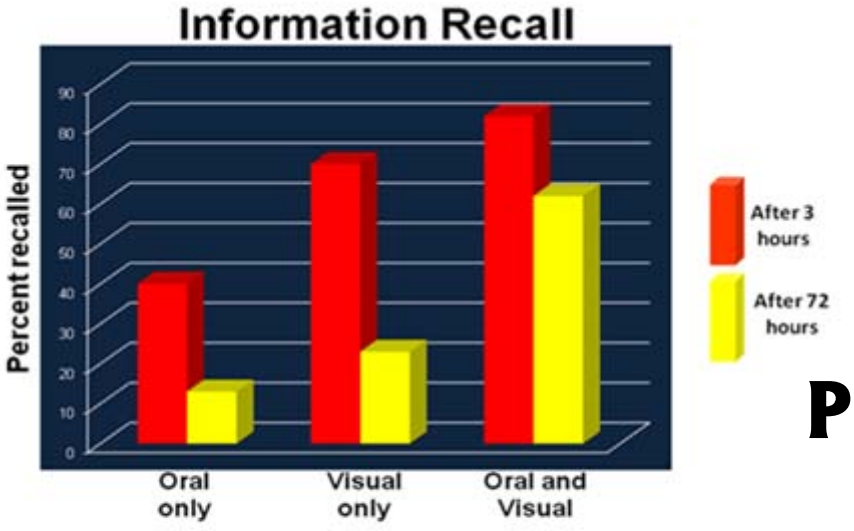
Trying Cases Visually



Presented by
J. Ric Gass

Trying Cases Visually™
Understanding the Effective Use of Visual Communications in Your Legal Practice[1]

by

J. Ric Gass and Dr. David Faust

[1] The first edition of this chapter was co-authored by J. Ric Gass and Samuel H. Solomon . J. Ric Gass of Gass Weber Mullins LLC is a trial lawyer practicing nationwide. His firm is in Milwaukee, Wisconsin. He has been Adjunct Associate Professor of Law at Marquette University Law School in Milwaukee, where he also received his J.D. degree. Mr. Gass is a Fellow of both the American College of Trial Lawyers and of the International Society of Barristers; is a Master of the Bench in the American Inns of Court; is a Diplomate in the American Board of Trial Advocates and is a Board Certified Trial Advocate. He is listed in *Who's Who in American Law* and has been listed for over a decade in *The Best Lawyers in America* (6th ed.). Mr. Gass is a nationally known speaker on the subject of trial practice and persuasion, notably for his *Trying Cases Visually* and *Catastrophic Injury* seminars. Mr. Solomon is Chairman and CEO as well as product designer and developer, for DOAR Litigation Consulting of Valley Stream, New York, a firm providing trial communications, technology, and consulting to attorneys and prosecutors nationwide.

I. INTRODUCTION

This chapter is in a treatise about mental conditions. You have turned to this treatise to learn about those conditions and their diagnosis and challenges to their existence. A Chapter on trial visual aids and Communication would at first blush seem out of place.

The conditions and claims you are probably preparing to deal with are largely invisible or not directly visualized. If the case involved injury to the brain visible on MRI or CAT scan you would probably be handling the damage claims differently. The injured part of the body would be visible (at least through scans, x-rays, etc.) and most likely the effects of the injury (slurred speech, motor function, sensory impairment) would be visible to a jury. Dealing with claims of brain injury that arise in the absence of visible injury and without visible physical effects are more challenging.

The claims of soft brain injury that have nothing but subjective complaints leave jurors with nothing but test "results" to see, feel and touch. Jurors are deprived of their normal way of gaining information and making decisions. As a result, it is more important in cases involving such claims to provide jurors with a visualization of the claims and evidence so they can understand the claims and the defenses and fairly decide the issues.

Three other matters require prefactory comment. First, it is not just neuropsychological damage claims that require visual communication in a trial. The entirety of the trial needs visual as well as verbal communication. Visual

communication in general will be explored below. Second, visual communication is only one of the eight dimensions of trial work and all visual communication has to be in harmony with an understanding of all dimensions of the trial. In a section that follows, The Eight Dimensions of Trial will be set out.

Third, every trial has to have a theme or storyline with sub themes or storylines for the liability and damages phases. Jurors do not organize information as lawyers do in syllogistic reasoning. The most persuasive of trial lawyers possess the skill to translate analytical argumentation into narrative and story. Rather, they draw on their life experiences and organize what they see and hear into a story format. One study found that 95% of all individuals organize material around a story rather than other organizational schemes. They need "titles" and "subtitles" and visuals to give them a story structure within which to place the facts, evidence and opinions they hear from the witnesses. This means that the visuals for your neuropsychological testimony need to tell a story, maintain and support a theme and be consistent with an overall damages and case theme.

II. VISUAL COMMUNICATION IN GENERAL

Effective and persuasive courtroom communications require that attorneys be creative in the development of visual aids to *facilitate the jury in understanding by seeing and feeling* the merits of the case. Hopefully, this overview will give practitioners some basic and powerful ideas as to how they can fill the courtroom with stimulating and compelling demonstrative aids while staying within a budget that is reasonable and cost-effective.

This chapter is composed of three parts: “Why” and “How” to try cases visually are the first two parts. While any trial lawyers worth their salt know they need to use demonstrative evidence, there is a wealth of research that can aid us beyond our mere gut instincts concerning the power and nuances of visual communication. That is the “Why” section. The “How” section (amplified by a later section describing specific technologies and equipment) addresses the spectrum of technology that is available for the trial lawyer to communicate visually—from the simple and inexpensive to the sophisticated and larger investment.

The third section, “What” to communicate visually, is perhaps the most important. It provides guidance on how to make the difficult choices of the right kind and amount of visual evidence so that a powerful piece of visual evidence, such as the videotape of the beating of Rodney King, is not so diluted that it loses its persuasive impact.

Your audience is “media hungry.” People are bombarded with thousands of visual images every day. It is how we process and evaluate the information-rich world we live in. The use of visual aids is your critical edge.

Research on effective visual presentations demonstrates that *75% of* what we learn is acquired though our eyes. Only a small portion comes through our other senses [David A. Peoples, *Presentations Plus: David Peoples’ Proven Technique*

(New York: John Wiley & Sons, l988)][2]. Some of these same studies show that visuals significantly improve the "action" level of participants.

One study, using color overheads as a proxy for visual presentations in general, demonstrates that action by participants to commit time and money increases significantly with visuals.[3] Finally, financial commitment by the audience improves with professionalism, i.e., transforming handwritten charts to high quality visuals, In fact, sometimes handwritten material works against the presenter. *Positive action in your client's favor is the objective of every attorney—and visuals help lead you to this goal.*

Besides jury communications and action implementation, attorneys must be concerned with retention. Research studies show that retention is significantly improved with "show and tell." The jump in retention after three days between telling versus telling *and* showing is *55%.*[4]

The end result of good visual material is to give the attorney *the edge*, especially in complex cases—the ones that end up in trial (if the case were straightforward, it would probably settle). Attorneys need that edge, especially

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[2] Parker (1960) puts the percents at: sight: 85%*;* hearing: 10%; touch: 2%; taste: 1-1/2%; smell: 1-1/2% (Thomas P. Parker, "Applied Psychology in Trial Practice," *Defense Law Journal. 7*, pp. 33-45),

[3] Douglas R. Vogel, Gary W. Dickson & John A. Lehman, *Persuasion and the Role of Visual Presentation Support: The UM/3M Study*, Minneapolis, MN: Management Information Systems Center, School of Management, University of Minnesota, 1986.

[4] Presier, Stanley E. (1980), "Demonstrative Evidence in Criminal Cases," *Trial Diplomacy Journal, 4*, pp. 30-32; Wiess-McGrath Report by McGraw-Hill, cited in Dombroff, Mark A., *Dombroff on Demonstrative Evidence* (New York: John Wiley & Sons, 1983).

when they sense the issues are borderline.

A very important and early part of your goal is to get beyond the information clutter that all jurors face. Your jury has to contend with *your* message among all these:

1. They will have been exposed to 300 ads before 9 a.m. when they start to hear evidence;
2. They will have been exposed to two million sophisticated TV ads produced at a cost of $400 billion by the time they are thirty years old;
3. They will see an average of 24,000 supermarket items each month—all packaged to be not only the most visually appealing product, but one that will make that juror buy it;
4. They have learned 83 percent of what they know visually and only 11 percent by hearing;
5. They have an alert attention span of one to ten minutes;
6. They have a comprehension rate of 600 words per minute while the normal speaking rate for attorneys is 150 to 200 words per minute.

Add to those facts that research has demonstrated that, in terms of impact on an audience, 7 percent of presentation is content, 38 percent is voice and 55 percent is non-verbal,[5] and you wonder how you can ever try a case with just words. In fact, you should not feel just wonderment, but fear. In the words of the

[5] Albert Mehrabian, *Nonverbal Communication* (Chicago, IL: Aldine-Atherton, 1972).

Wizard of Id, *"Unforgettable words are seldom remembered."*

Jurors live in a visual world. They expect visual communication in the courtroom just as in the rest of their lives. The bulk of the American population has been raised on TV. If one party in the courtroom is using visual communication and the other is not, the likely winner is going to be the visual, not the verbal, communicator. The research establishes that with equal content, the average presenter using visuals will secure audience change in their favor of 16.4 percent while a better presenter without visuals will only secure an audience change of 11.4 percent (Peoples, 1988). What this all totes up to is that to win with today's juries, you have to *Try Cases Visually*.

There are three facets to *Trying Cases Visually.*

The first is the easiest and it is part of what we have referred to above: the machines and technology that trial lawyers can use in their own offices to produce low cost and yet highly effective visual aids for the courtroom. The science and technology has advanced to the point where trial lawyers can have the equipment to do enlargements in-house, and your paralegals can have available a complete array of colored foam board to mount them on and know all the tricks of producing enlargements of the appropriate portions of documents to achieve the greatest impact. In court you should be using a document camera which is essentially a live video camera connected to a TV screen so that you can show the jury whatever exhibit or document (and even X-ray) is important, and have the capability of zooming in on the one or two words that may be crucial to your case.

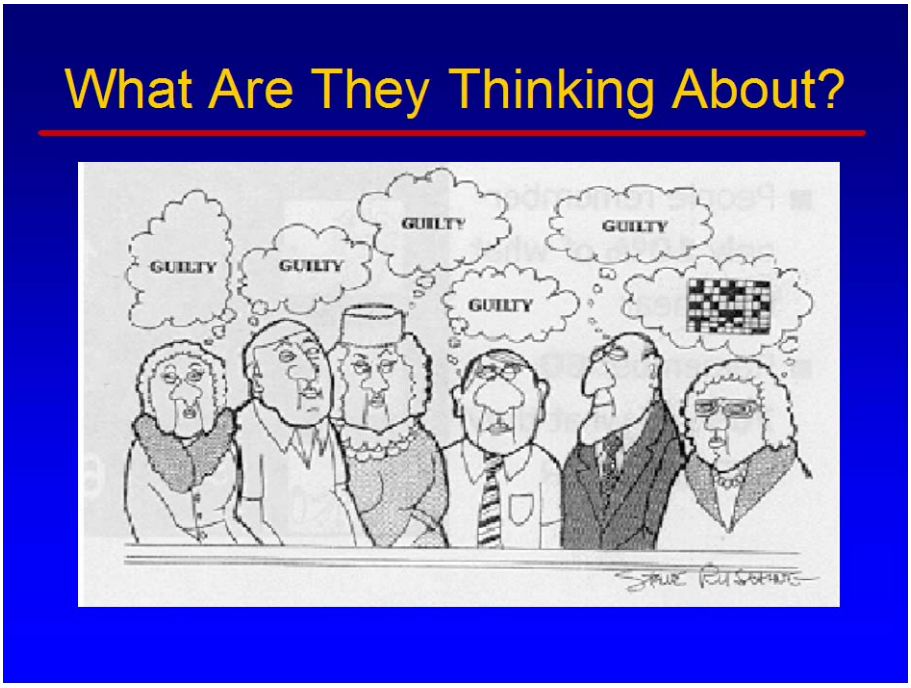
Presentation software such a Summation, Trial Director and PowerPoint are available to all lawyers.

The second facet of *Trying Cases Visually* is the ability to visualize what the courtroom presentation is going to look like. It is similar to the athlete's ability to "see" what his or her form is going to be as they compete. Whether it is the visualization of the perfect golf or tennis swing or the slam dunk, the best athletes can see what they are going to do. The 100-yard dash runner "sees" the entire race as he or she sets up in the starting blocks. Tiger Woods "sees" the path of his putt. The trial lawyer must have the same visual ability and must "see" the witness testifying and determine what visual communication will be used with the witness and not just have a page of questions and answers prepared for each witness. The trial lawyer must be able to objectively visualize what he or she will be doing in that examination or argument and how that will impact on the communication with the jury. The entire communication package of lawyer-witness-visual aids should be *"visualized"* by the lawyer as part of the preparation.

The third facet of *Trying Cases Visually* is the ability to use words to paint mental pictures in the minds of the jurors. The great trial lawyers have all had the storyteller's ability to tell the story of the case they are trying. Before television, families would gather around the radio and "watch" *The Shadow* and Sky *King* and the other classic radio programs. Americans were thrown into a panic by their vivid imaginations during Orson Welles' *War of the Worlds.* There is a current radio advertising program called *You Saw It on the Radio,* which has a fake

advertisement with such graphic description that you can “see” a gorilla climbing up the downspout of your house. All of those are examples of the power of verbal painting of mental pictures.

We, as trial lawyers, must be able to use our words to paint those pictures in the minds of jurors. Those are powerful persuaders; the jurors will hold those mental images strongly because they are a product of their minds and not just something that your opponent or another juror is trying to sell to them. But, as powerful as mental images are, the problem with mental pictures in the jurors’ minds is that there is no guarantee that all of those pictures will be the same. Different words, albeit similarly evocative of mental images, mean different things to different people. We may both see “a” gorilla climbing up the downspout, but not “the” gorilla. Maybe the important thing is that it is a gorilla and not that yours is brown and mine is black, but frequently in trial, the color of the gorilla is as important as the fact that the picture is a gorilla.



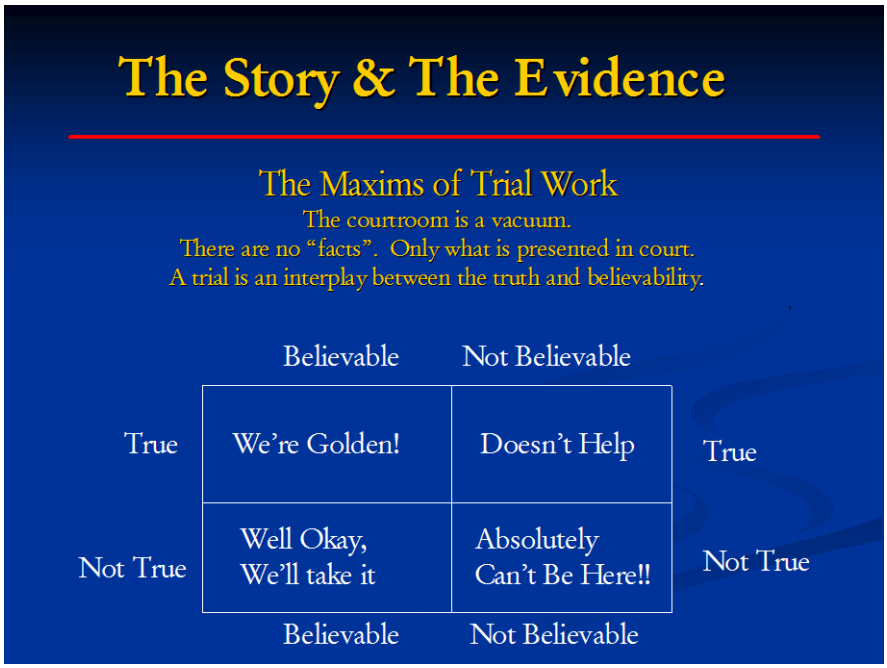
While we are talking about images we should note that in a trial there are a multitude of "images." There are the real images captured by the jurors eyes and recorded in their minds. Images of counsel as they present. Images of visual aids. Images of the plaintiff's injury displayed in person or in photos. Those real images can be addressed by perceptive counsel and dealt with. But, jurors also "conjure up" images in their own minds that counsel cannot see and will likely never know about and which may have far more impact on the verdict. For example, the jury may never hear testimony about a spinal cord injured plaintiff's sex life and thus have a mental image of the plaintiff as incapable of sexual intimacy. For many spinal cord injury patients, nothing could be further from the truth. Trial counsel needs to be attentive to likely images and address them whether "real" or "imagined." Jury research and focus groups is very helpful in anticipating images such as these.

The verbal painting of mental pictures is the art of trial work. The technology of visual communication is the *science* that helps ensure that the mental picture in all the jurors' minds is the same and that they all see the picture in the same colors. It is thus the marriage of the *art* of the trial lawyer/storyteller with the *science* of visual communication technology that today gives trial lawyers the greatest persuasive impact.

III. THE EIGHT DIMENSIONS OF TRIAL WORK

What goes into a trial is a combination of what the trial lawyer brings to the courtroom and what is in the courtroom. That combination is The Eight Dimensions of Trial Work. Preparing for trial requires looking at the trial through all eight dimensions.

The trial lawyer brings to the courtroom their facts. The courtroom is a vacuum before the trial starts. We as the trial lawyers know all the supposed "facts" of the case. But those facts don't "exist" in the courtroom until first presented. Even after presentation they aren't "facts" even if "true." They only become true facts when accepted and believed by the jury to be "the" facts.



The first three dimensions then of trial work are:

1. Facts

2. Presentation of the facts

3. The persona of the trial lawyer and the witnesses presenting facts.

It is a holy trinity of

1. The Message
2. The Medium, and
3. The Messenger.

This is the area where visual communication is the key. As you plan the testimony you will present keep in mind four S's of testimony.

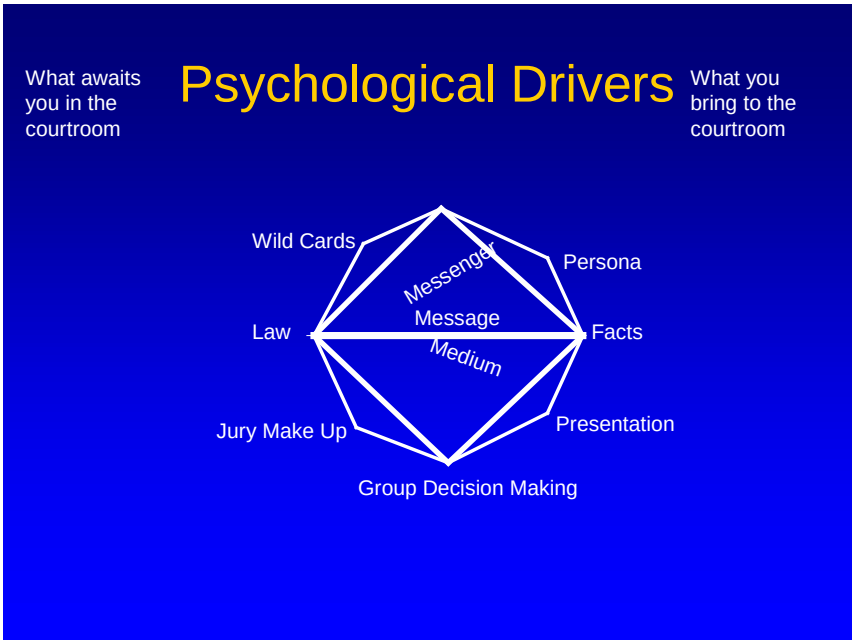
- Substance of the testimony
- Semantics of the testimony
- Style of your and the witnesses delivery
- Staying power of the testimony.

More on these dimensions in a bit.

The balance of the eight dimensions of trial work are in the courtroom.

4. The law – some brought by the trial lawyers, but declared by the judge.
5. The jury make up – somewhat influenced by jury selection.
6. The psychological drivers – the pre-existing attitudes, experiences, bias and prejudices of the jurors – partially detected vicariously by pretrial jury research and mock trials.
7. Wildcards – surprise testimony or rulings or events.
8. Group not just individual decision making by the jury.

As you consider the visual communication of neuropsychological testimony and evidence and the case evidence and presentation in general, you must consider it inside all eight dimensions of a trial.

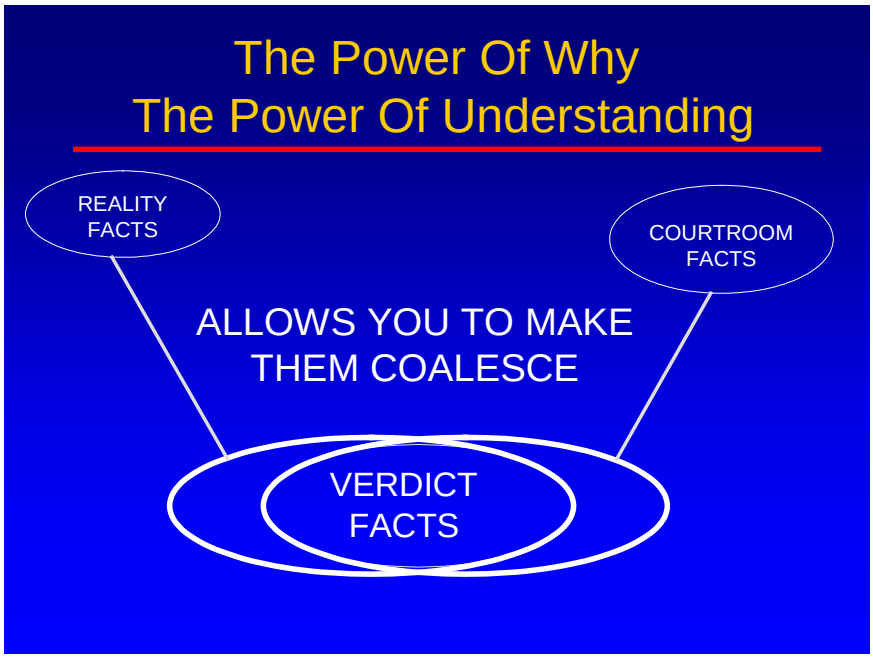


In trial work you have to see at both the forest and the tree level. You have to be able to globalize the case with a bumper sticker tag line: "This is a case about . . ." But you must also be a master of the details.

While you must excel at a tactical and techniques level, you must also be able to set a global strategy. You must be both a general and a field commander. Trial work is an art and it is difficult to put words to art or an art. It's not the paint, it's the painting. It's not the notes, it's the music. It is more often things you caught rather than things you were taught.

To excel as a trial lawyer you must be more than a purveyor of information to the jury because jurors have a bigger job than just being an information sponge.

You have to help them turn information into knowledge and then into answers on a verdict that reflect wisdom and understanding. Visual communication is part of the process, but always keep in mind that the goal of your visuals isn't just information. They like all evidence and communication in trial are higher goals. I call it The Power of Why. If you can help jurors understand the **Why** of the evidence, you give them understanding and with understanding comes justice. The Power of Why helps make real facts and courtroom facts one in the same.



The case theme does likewise. The theme of a case and of a trial frequently starts with "This a case about…" How counsel characterizes the case in the remainder of that sentence has a major effect on the jury. It is the "title" of the story they are about to hear. It is the "bumper sticker" of the case.

The remainder of that sentence frequently comes from the facts of the case but it doesn't have to. Many of the cases you handle have facts so bad for your side that you have to look elsewhere for the theme. In a punitives damages case for example, the defense will be confronted usually with bad facts. The theme then might become "Punishment is mine saith the Lord" in an attempt to get the jurors away from the inflammatory nature of the facts and the emotions of punishment. Another good example of a theme is found in "The Judge" by Steve Martini. The defense lawyer develops a theme with two catch phrases: "But he has not told you this" and "What he has not told you is what he does not have".

The theme is can also be thought as the chorus of the song. The trial lawyer is the lead singer providing the words (the evidence and testimony) of the verses and always coming back to the theme as the refrain or the chorus of the case. – and hopefully the jury acts as a chorus to sing the theme, the "chorus", the refrain, the theme.

Another description of the theme is "the story above the evidence" It is a thing that moves the jury beyond the details of the evidence. It unifies and globalizes the case. It has a gesalt effect of being bigger than the sum of the evidentiary parts. It takes on a life of it's own. The gesalt effect of creating this larger than individual parts allows jurors to fill in empty spaces (things the evidence hasn't filled in with their own filling.

This is part of a process called nominal anchoring. Not nominal in the size of small size, but rather nominal in the sense of name. Once something has a "name"

people ascribe qualities to it and it becomes something. Before a case has a name the jury doesn't know what it is other than lawyers talking. Social worker therapists describe this process as: "If you can name it, you can claim it and tame it." Trial lawyers are trying to do the same thing with the case and the trial.

Each part of the case needs a "name". The overall case needs a name. The liability portion of the case needs a name. The damages portion of the case needs a name. Obviously the case portion names need to fit together and compliment each other. (It is frequently helpful also to attach names to witnesses to attempt to get the jurors to either dismiss them or rely on them. "The brilliant doctor from Harvard." "The Philadelphia lawyer". "I call Mr. Jones, Mr. Evasive".)

As you plan your visual aids and visual communication you need to always make certain that the visuals are integrated with the theme of the case or subsections of the case.

IV. THE TRIAL LAWYER'S NEED TO COMMUNICATE VISUALLY: WHY

A. GENERAL PRINCIPLES

The purpose of this section is to set out some essentials of successful communication with juries. This is not an attempt to set out the definitive work on this subject. This section sketches the outline of some of the science of communication with juries but leaves to the art of trial work the filling in of the details.

What is being communicated to the jury can be referred to *in toto* as

information. Remember, though, that the information being communicated is not just words, but an amalgam of facts, evidence, proofs, ideas, attitudes, inferences, emotions, conclusions, arguments, et cetera. All of these elements are subject to what follows.

The *first dimension* of good communications requires first that the information be *organized.* The receiver of the information must not be distracted from the information by having to develop a format of organization. Organizational format, whether it is chronological, geographical, personal, or whatever, depends on the case, the evidence and the trial lawyer.

Secondly, the information must .be *explicit.* It is the exception rather than the rule where counsel can or must be oblique or subtle in communicating factual information to the jury. The old speaking rule of *"Tell 'em what you are going to tell 'em. Tell 'em. Tell 'em what you told 'em"* sums it up quite well.

Thirdly, information must *build* upon the information presented earlier. There should not be gaps or leaps of faith to be filled in later on by the jury. The conditional relevance doctrine in evidence law may allow admission of evidence with later connecting up or supplying of the foundation, but that runs a substantial persuasive risk of losing the jury's understanding of the evidence and its significance.

Fourth, the information has to form a *chain of logic.* It must fit together in a logical fashion. In fact, the more you have followed the first three principles of organization, explicitness, and building, the more crucial logic becomes because

its absence becomes more conspicuous.

The process of a trial must start the juror with an early and clear understanding of the basic information of the case and move to the complex information only after the basic elements are clear. Trial counsel's job is to explain and/or integrate any contributing information so that agreement among the jurors is possible. For the advocate, good communication has but one end: agreement with the advocate's position.[6]

The *second dimension* in communication is visual aids, which are the attention getters and motivators which translate the passivity of words into active decision making by the jury, and the use of which is the subject of this section. Words and sentences communicate with the jury in a sequential fashion where each one must be remembered and then connected to what came before and what comes after. Visual aids communicate entirely differently: the entire concept is presented at once and the jury does not have to think sequentially as with verbal communication.

The *third dimension* of communication with the jury is *"the medium"* that is used by counsel. *"The medium is the message"* is more than just a buzz phrase. Whether the medium is the tone of voice, the body language, the visual aids, or TV/video, there is a message (of competence or incompetence, of confidence or lack of confidence, et cetera) being communicated to the jury. As you will see in

[6] Perhaps all these factors can he summed up in the "Persuasion Process Model" in Vogel, Dickson, and Lehman, *Persuasion & the Role of Visual Presentation Support: (.J&1/3M Study* (1986).

this section, the use of visual aids presents counsel to the jury as a more interesting, credible, professional and persuasive advocate, Trial counsel and witnesses (whether expert or lay) are also the medium through which the message is delivered. Thus, you, and your witnesses as well, become the message.[7]

Remember, though, that visual aids are no substitute for good cross-examination, direct examination, creation of a case theme, preparation, conviction and belief in your case, and credibility of your client, witnesses and yourself. But visual aids can overcome weaknesses in cases and create strengths, and are essential to ensure that your points are made, understood and remembered by the jury.

B. JURY INFORMATION ACQUISITION

[7] An Excellent commentary on this aspect is *You Are the Message,* Homewood, IL: Dow Jones-Irwin, 1988) by Roger Ailes, who was one of the principal advisors for the presidential campaigns of Presidents Reagan and Bush.

The statistics are deceptively simple: 75% of what we learn comes to us visually, while 13% of what we learn comes to us verbally (Peoples, 1988).

C. JURY MEMORY

Ten percent of information delivered only verbally is remembered after three days. Twenty percent of information delivered only visually is remembered after three days. However, sixty-five percent of information delivered both visually and verbally is remembered after three days. Thus, verbally and visually delivered information is six times as effective as verbally delivered information alone (Presier, 1980).

D. JURY DECISION MAKING

The first effect of visuals on group consensus is that their use increases the percentage rate of consensus from 58 percent without visuals to 79 percent when visuals are used.[8] The figures alone may not be that significant since virtually all juries do reach what would appear to be a consensus, i.e., the hung jury is a rarity. However, most jury verdicts are great compromises and not a consensus totally favoring one side or the other. Our goal, of course, is usually not a compromise but vindication of our client and we seek a jury consensus in our favor. Thus, this finding as to consensus formation is an important one to keep in mind.

An even more telling finding is that when visuals were used, decisions were

[8] Lynn Oppenheim et al., *A Study of the Effects of the Use of Overhead Transparencies on Business Meetings* (Philadelphia, PA: The Wharton Applied Research Center, October 1981).

reached at the time of the presentation 64 percent of the time, whereas decisions were reached only 48 percent of the time when presentations were made without visuals (Oppenheim et al., 1981). Thus, making your case without visuals not only reduces the likelihood of a favorable consensus, hut delays the decisional process'. For the defense this can be disastrous.

When visual aids are not used, a group consensus is delayed 52 percent of the time and only reached at the time of the presentation 48 percent of the time (Oppenheim et a!., 1981). This does not mean that a presentation to a jury without visual aids will not result in a consensus, i.e., will result in a hung jury.

Rather, what it means is that the likelihood of compromise by the jury without a consensus in complete agreement with the presenter is greatly increased, as is the likelihood that the consensus will occur later rather than at the time of the presentation when visual aids are not used. That means that the jury is likely to make up its mind in your favor at the time you use the visual aids. Thus, the earlier the use (e.g., in the opening statement) the better.

In addition to making presentations more effective, the use of both evidentiary and non-evidentiary visual aids can cause a substantial reduction in the time necessary to try a case. The use of visual aids can reduce the length of a meeting by 28 percent (Oppenheim et al., 1981). While that figure may not be directly transferable to a trial, in our opinion it is probably close, especially since a trial normally has no constraints on length such as are built into a business meeting. In all probability, the savings in a four-day trial should be at least a day,

if visuals are aggressively used by both sides. Use by one side probably decreases the time savings by 50 percent.

E. JURY PERCEPTION OF COUNSEL & WITNESSES

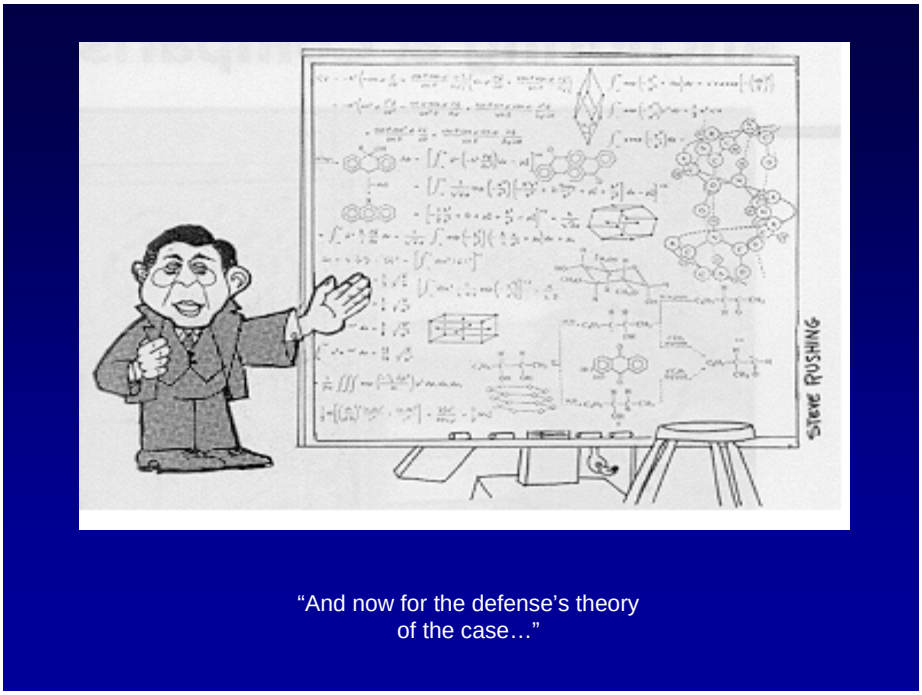
The Wharton Study also found that presenters who used visual aids were perceived as more persuasive and interesting than those who did not. That fact applies not just to you as trial counsel, but also to your witnesses. To have your experts perceived as more persuasive and interesting, build visuals into their presentation. Other evidentiary charts, graphs, and models can be built in as appropriate.

Of more significance, however, is that when you are perceived as a better presenter, the audience expects more from you in the use of visuals, An average presenter using visuals is perceived as more persuasive than a better presenter without visuals. And, a better presenter using handwritten visuals is actually viewed as less persuasive than if no visuals were used. Thus, the better you become in presenting, the more you must use high quality visuals.

Visual evidence and the media we employ go well beyond their use in front of juries. Attorneys emphatically tell us that the creation of visual and demonstrative evidence helps them fine tune the theory and the development of their cases. More importantly, it improves the success at pre-trial/settlement conferences, bench hearings, arbitration and mediation. For example, the creation of video depositions and settlement brochures, evidence preservation and, finally, witness and trial preparation has been proven very effective.

Unfortunately, video depositions usually employ the "talking head" of the witness droning for hours of testimony. Aside from offering the most boring experience for jurors, this form of deposition disregards one of the most important elements of live *trial—integrating the demonstration of the evidence with the witness's testimony.* Further on in this chapter, we will explore solutions to this emerging trend in discovery.

V. HOW TO COMMUNICATE VISUALLY



A. INTRODUCTION

Once a trial lawyer has decided to increase visual communication at trial, there are many options in technologies available to the attorney. Some are old but with new twists, while others are new. The *first* emphasis in this section is on technology that, first and foremost, a lawyer can operate. Most of us are

procrastinators. We end up doing the final trial preparation the week and weekend before trial. We end up not having the time to send exhibits out to be done up professionally. We need in-house capabilities to create last-minute trial visuals. Our emphasis is on *empowerment* of the attorney to produce and develop effective demonstrative aids *in-house.* Empowerment means that the attorney has direct influence on the persuasive and visual aspect of the trial—without feeling overly burdened by logistics. This is a very important goal of this chapter. The *second* emphasis is on cost. Most trial visuals produced at, for example, photo labs are very expensive. The equipment described in this chapter is not only relatively inexpensive, but it also has the ancillary benefit of saving clients money by producing the visuals at a lesser cost than can he done outside. *Third,* all of these technologies are portable and flexible, so that most can be taken to the site of the trial (hotel room or even the courtroom) and can produce visuals in a virtually instantaneous fashion, even during the examination of a witness.

B. FORMS OF VISUAL AIDS

The most usual form of visual aid in the courtroom is photographic blowups, whether of photographs, documents or diagrams mounted on foam board. The advantages of immediate availability and portability are offset by the disadvantage of cost and the need for pretrial time for planning and production and once produced they are difficult (if not impossible) to modify.

Another traditional visual aid is an overhead projection transparency. Low cost, ease of creation on a photocopier, and availability usually outweigh the

additional equipment needs (projector and screen) in the courtroom. Even full color photos can be copied on transparencies at low cost. The overhead's use must be balanced against the need to prepare transparencies beforehand, the lack of zooming-in for attention-getting and the issue of courtroom lighting.

Of course, the old standbys of models, blackboard and easel pad are still useful tools, as well.

Computer presentation technology along with TV (monitors and plasma screens) along with LCD projectors have become the standard for visual presentations. They have unlimited potential for use with documents and in all parts of the trial from opening to closing. People are being exposed to this technology in the courtroom, on nightly news, CNN and Court TV. Use of TV represents the quintessence of the "*medium is the message*" principle. Color, available with TV equipment, is an essential part of visual presentation. Visuals in color are over twice as persuasive as those in black and white.

C. TODAY'S VISUAL AIDS

While there are still good reasons and times to use foam boards and individual copies of visuals for each juror the primary delivery of visual communication in trials today is by a laptop computer hooked to either an LCD projector or a large screen plasma TV. The plasma screen brings a warmth and more intimate display of the information. The projected image brings size and impact.

Irrespective of the display device the driver of the visual substance is the

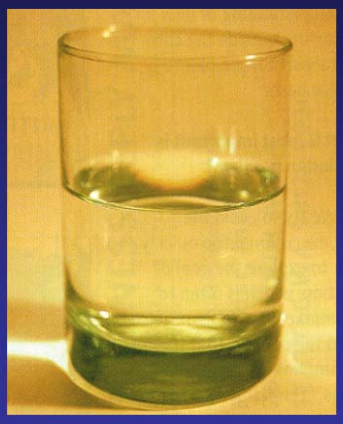
computer and a software program. PowerPoint, Adobe, Acrobat, Trial Director, Sanction, Summation or whatever, with the most ubiquitous being PowerPoint.

PowerPoint can be both a blessing and a curse. There is at the threshold more to PowerPoint than just a visual presentation medium. It makes you create hierarchical outlines. It forces on you an organizational schema. It restricts your tendencies to deviate and get off message. It helps you edit ideas, organize and make your case as you construct your argument. It should make you cull the wheat from the chaff.

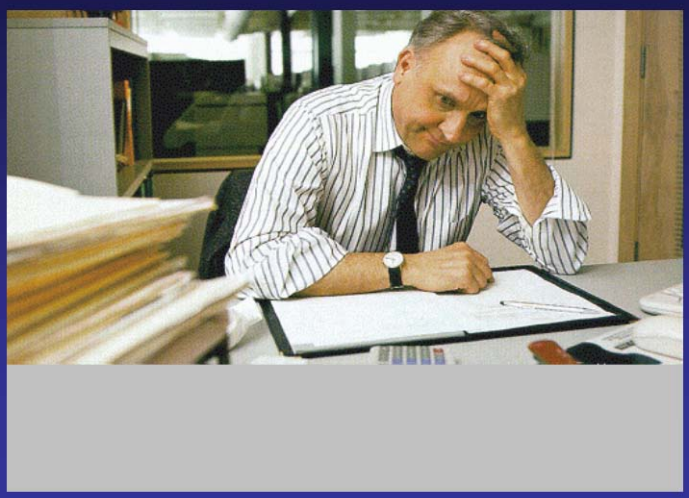
When it is well used it breaks the linear medium of language: one damn word after another. Trials well presented traffic in ideas not just words. Ideas are multidimensional not linear. When used correctly PowerPoint has the power to help communicate the feelings and ideas so essential to a trial. Plus the use of an outline of your presentation frees you from looking down at notes and frees you from being locked behind a lectern. It also allows you to share your notes with the jury and to create a shared experience with them as you and they turn to the screen to focus on a point or to "move to the next topic." This all is giving a visual shape to your presentation.

PowerPoint allows you to combine organization and word structure with ideas and concepts but it additionally is a delivery device for the substantive visuals of the case (documents and portions thereof, photos and zoomed portions of them, etc.) as well as for visuals of concepts like the following.

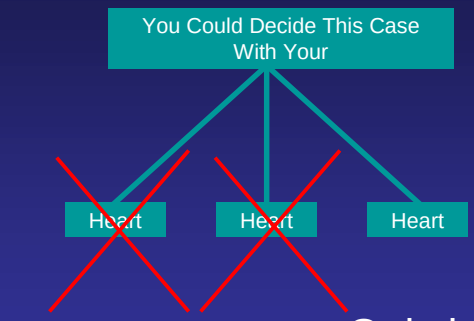
Half Full or Half Empty?



The Ticking Time Bomb



Head – Heart - Gut



Judge Says No

Only head allowed by instructions

But, here's the tricky part. PowerPoint is like the apple in the Garden of Eden. Once you take a bit of those bullet point slides, it's "one damn bullet point after another." And, overuse of bullet point slides replaces the powerful human contact and interaction a trial lawyer can have with jurors. There are times when you have to make the screen go black so the jurors cannot divide their attention and will just focus on you to get the full impact of the force of your passion and persona undistracted by bullet points.

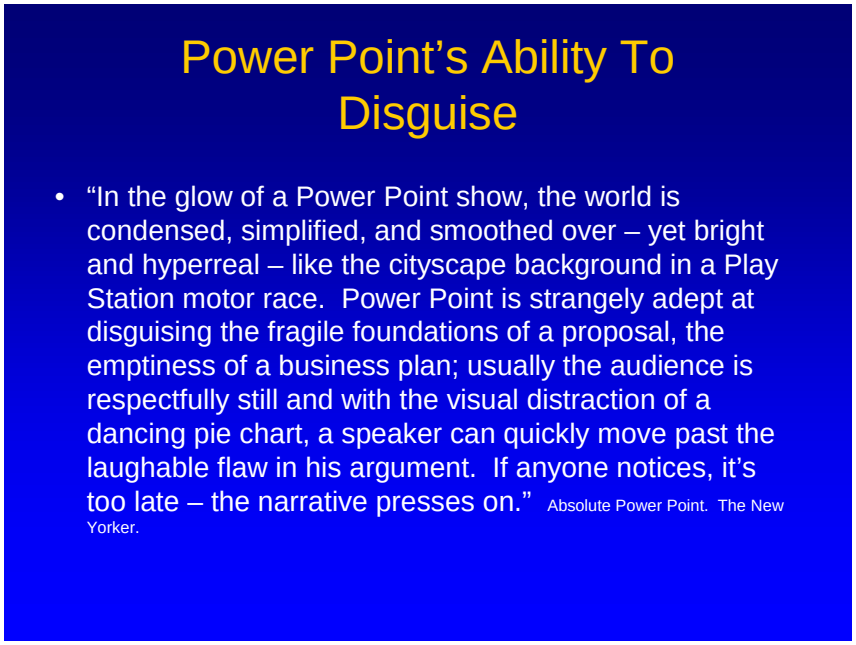
The resource you need to consult on this is the book *Beyond Bullet Points* by Cliff Atkinson. See the resource section at the end of this chapter.

One simple way to avoid the dreaded bullet by bullet format is to do you organization of the substantive topics and points in PowerPoint so you see your argument and refine it. Then move all those bullets and words to the notes section of the PowerPoint notes view so you then have a blank slide above. Now, create a visual image or images or combination of images and phrases that reflects the substance in the bullet points hidden from the jury's view in the notes section. You can make the notes visible for your on a laptop screen in front of you synchronized with the slide the jury sees through software called Presentations Synchronizer from presentsolutions.com

When using PowerPoint you need to consider whether you are using it to present information or discussing information. When presenting you can use more bullets than when discussing and moving a jury to a conclusion.

If you begin to use PowerPoint and to really think about it and read up on it,

you will find much criticism of it and how it can "dumb down" information. Here's but one such criticism.



Another prominent critic of PowerPoint is the brilliant author Edward Tuftee. (You need to read all four of his books listed in the Resource section.)

These criticisms however are principally directed to the use of PowerPoint in the decision making process in businesses and government. In the courtroom, the criticized "condensation, simplified, smoothed over" is exactly what we have to do and can be used to our advantage. So, weigh the criticisms but remember the trial lawyers job is a unique communication venue.

Lastly the effect of PowerPoint on presenters and the perception of them. PowerPoint quickly lifts up the less skilled presenter and enhances the perception of them. The higher skilled advocate who eschews this visual tool gives up the added impact of it and runs the risk that an opponent might tip the scales against

them with the skillful use of PowerPoint. But also the higher skilled advocate must not allow PowerPoint to lower the ceiling and squeeze out the skilled of the storyteller, the rhetoric and the poetry that the skilled trial lawyer can bring to the verbal discussion with a jury.

D. TYPES OF VISUAL AIDS

Most visual aids used in the courtroom are evidentiary in nature. That is, they are substantive evidence. They are received for their truth and must have a proper foundation, be accurate and satisfy the rules of evidence. A subcategory of evidentiary visual aids is the illustrative visual aid. It is not a photo of the accident, but a fair and accurate chart, graph, et cetera, which summarizes or otherwise accurately conveys underlying data.

The visual aids which are more important, in our opinion, are the non-evidentiary aids which visually convey, supplement, or summarize the witness's oral testimony or the argument of counsel. These aids assist in explaining an important issue to the jury, as opposed to being evidence themselves, and do not go into the jury room. They are a means and not an end as are evidentiary visual aids, but are very important as tools used to communicate with the jury.

To draw analogies: the evidentiary visual aid is the implanted medical device, while the non-evidentiary visual aids are the scalpel and saw used to do the operation; the non-evidentiary visual aids are the mechanic's tools while the evidentiary visual aids are the new spark plugs, points and condenser,

While non-evidentiary visual aids are not exhibits, they should still be marked

to complete the record as to what was being used in the witness examination, statement or argument. In addition, the marking process validates the visual aid in the jury's mind as an official part of the process.

Visual aids can be used at any time since they require no evidentiary foundation. Use them in opening or closing and while examining witnesses.

The techniques that follow all involve non-evidentiary visual aids. Remember, these are not pieces of evidence. Rather, they are utilized only to enhance counsel's communication with the jury.

Since demonstrative evidence is intended to assist the expert or witness in his or her testimony and is not direct evidence in the case, establishing the foundation is usually straightforward. It is important to consider whether the specific visual aid can be construed as prejudicial by highlighting some issue out of context. With this considered, typically you will need to establish the following.

Have the witness state that:

1. The visual aid will help him/her explain the testimony,
2. The visual aid will assist the jury in understanding the testimony and the issues involved,
3. The visual aid depicts a scene, object or image with which the witness is familiar,
4. The witness testifies that, in his/her opinion, the visual aid is a fair and accurate representation of the scene, object or image involved.

Of course, if your visual aids are admitted as evidence, their effectiveness is further enhanced. If you are unclear as to the evidentiary nature of the exhibit, it

may be a better strategy to consider the exhibit for demonstrative purposes only.

E. PREPARATION

A more detailed presentation on the "what" to communicate is described in Section VI; however, a few words on preparation are in order here. Preparation is the *sine qua non* of trial practice, and our tendency to "leave things for the last minute" should be resisted, With jurors eager for visual material, the trial attorney must be aware of and have an accurate understanding of the visual technologies and methods available, Visual aids must enhance and endorse the critical themes of your case, Finally, one must *integrate visual aids early in case preparation* so they are organic and fit well with oral arguments, witness preparation and cross-examination.

For instance, when deposing a witness, consider questions that generate responses which will evoke good visual exhibits to support or impeach the individual. While reviewing photographs, documents or learned treatises, keep a keen eye on what would appeal visually to a jury. In a document, for example, uncover the word or sentence which best illustrates and supports the theme of your case.

Consider these five basic steps to effectively prepare and present your visual material:

1. Audience analysis
2. Determining the theme of the case

3. Gathering visual facts
4. Determining the foundation elements and witness sponsorship for each exhibit
5. Rehearsal and courtroom inspection

Trial lawyers should do all that is possible to improve their chances for a successful verdict even before presenting their opening remarks. The first step is to carefully analyze the jurors. Education level, work experience, creativity and other factors help in understanding how one should simplify and present the facts of the case. Once an attorney knows the nature of the audience, one may adapt both style and content of what will be demonstrated in order to keep the jury intrigued and alert throughout the trial process. Design visuals to entice and emphasize both the logical and emotional sides of peoples' perceptions.

Jurors want to be informed and take readily to information which helps them understand. Juror interviews reveal that they are intrigued by technologies in the courtroom (unless it is seen as deceptive or disruptive). For example, if one adds attractive color to diagrams or backgrounds for photographs, jurors become intrigued with what you are doing and are more attuned to what you are presenting. Our interviews have shown that they will also perceive you as caring and supportive.

In gathering the visual facts, consider the following issues:

- Focusing yourself, the judge and jury on only *major themes* of the case.

- *Simplifying* complexity and details, such as expert presentations, witness testimony and documentation.

- Increasing *retention* of your key points.

- Keeping the jury *attentive and* awake—color is an important enhancement,

- Creating an appropriate *psychological "response"* on the part of the jurors.

    - Facilitating *favorable interaction amongst jurors* as they view the evidence as a group.
    - Projecting *a professional image* regarding preparation and the seriousness of the case.
    - Determining appropriate witnesses to *sponsor your visual evidence* and outlining foundation steps for each item.

Inspecting the courtroom prior to trial is very important. When evaluating the physical layout, you must determine the appropriateness of each presentation medium and the visual aids you will be using. Is courtroom lighting an issue? Will the judge allow flexibility in dimming the lights? Can you block out sunlight? How can you best position charts, TVs, screens and models so they can be seen by all? Do you need multiple visuals for proper viewing? How wide is the jury box for view? Will you, your associate or witness access the equipment, and how will this affect placement? How will your experts point to items on a chart or screen? Can you place a small TV by the judge for personal viewing (this is a great tactic)? It is worth a pretrial conference with the judge to ensure his/her compliance with your visual agenda.

In arranging the charts, TVs and screens, consider these issues: How do you position the media to bring you and your expert as close as possible to the jury? For example, can you position the projector in order to "enter the jurors' space"

while projecting an image on the screen? Is it possible to place the TV by the jury and have your witness stand alongside it and point out the salient features of the evidence? How do you ensure that all parties can view the material adequately? This is especially important with projection screens where the projector must be a certain distance from the 'screen' for optimal use; 'Try 'to' 'design your layout to facilitate the most involvement by the jurors. For example, by positioning the screen to one side of the jury box and the witness on the other, with your podium as center stage, the jurors' head movement follows from you to the witness and then the screen. This "active" involve-mean helps the jury remain attentive and interested as they follow you in unison. Consider also notebooks for each juror containing agreed upon exhibits and pages with photos of each witness.

VI. WHAT TO COMMUNICATE VISUALLY

A. INTRODUCTION

With all the research on the power of visual communications and the technologies available to present evidence, there is always a danger to overreach and think you should present everything in your "briefcase" visually. From any number of viewpoints, nothing could be further from the truth. Doing that would not only dilute the visual message, but more importantly, it is based on the erroneous belief that merely displaying something to the jury is going to cause them ultimately to agree with your side of the case,

This chapter could have had a section titled *"How to Try Cases Verbally"* and it could have gone through a series of explanations about how to achieve greater

range with your voice, more dramatic pausings, how to vary the tone and pitch of your voice, et cetera. We could have given you a series of exercises to make you sound like Jimmy Stewart or Ronald Reagan or John F. Kennedy. But, if there was not an emphasis on *what* to say, all that you would end up being is somebody with a good voice, but no substance. The same is probably more true with visual communication because of the added impact and communicative power of visuals. It is for that reason that this segment of the chapter, in many ways, is more important than everything else that you will read here.

B. WHERE TO BEGIN: WHEN DO YOU WORK ON VISUAL AIDS?

Once you appreciate the necessity of visual communication in the courtroom, there is somewhat of a daunting pause as to where someone begins to decide what is needed for the visual communication aspect of the case. Many times, as you go through your normal preparation of each segment of the trial, openings, the direct and cross-examinations, et cetera, the visuals just come naturally. It might be just an outline of a witness's testimony, or there might be a schematic of the concepts that witness is going to communicate, or there may be a particular MMPI profile or part of a profile, sections of DSM, or excerpts from reports that go with that witness. At the same time, though, as you go through your preparation for each part of the case, this thought should be at the end of the verbal/substance/semantics preparation for that part of the case: *"What do I need visually in this part of the case to really communicate with the jury?"* The end

result should be a series of visuals for each part of the case that, if you set them all up, would tell the story of your case and that virtually could be the closing argument for the case.

Visuals can be worked up right along with the file review and preparing of questions. However, it is best done at the end with reflection, after all other preparation is done, That is when the whole case is prepared and you can go back and *"see the forest for the trees,"* That is when you can go back and: outline the opening on overhead transparencies or large sheets; outline the witness examinations; outline the closing; and select and insert copies of pertinent instructions. You could essentially, at that point, set up the entire case outline as if on story boards on easels. Remember, this is not so much what you are going to say (the substance), but how you are going to say it, and the "black letter" summaries to which you are reducing the case.

Another way of approaching this aspect of where to begin is to put yourself back to two places in the development of the case. The first is the very first time that you became acquainted with the case and the other is the first time that you had to tell somebody else about the case, whether it was one of your partners, an associate, your paralegal, spouse, or an expert.

Think back to when you first got the case and what it was that you wanted to see and what it was that you saw that made you understand the case. Maybe that understanding did not come at the very initial look at the case, maybe it came at some other time; but whatever it was that made you understand what the case was

about, that is the type of visual that should have the same effect on the jury.

And then, when you think about the first time that you explained the case to someone else, think about what you showed them, Think about the criteria for a particular disorder and how they were not all present, or a conflict between different tests showing important inconsistencies— these points that you made to get across what the case was all about. That again will tell you what you need, not just to understand the case for yourself, but then to explain it to someone else. These are two excellent points to look at for understanding what it is that you need to communicate visually during the trial.

To conclude this section, whatever approach you take to organizing your case presentation, it is very important that you create a *storyline* for your case. It is your timeline of events or issues that occurred in the case in the specific order. When did the person first see the doctor, and what happened? Consider the particular scores on the WAIS that were important, the differing psychologists and their tests, and ‘where this all stands today. To this storyline, you anchor your key evidence and decide upon your theme. It is this storyline that focuses your attention on the important visual facts you want to present and keeps your jury focused, as well, on what you will prove and where you are going.

C. TOPICAL OUTLINES FOR CLOSING ARGUMENTS & OPENING STATEMENTS

The first technique used by Mr. Gass for non-evidentiary visual aids was outlines of opening statements and closing arguments on large (3’ x 4’) pads of

paper, or overhead transparencies for display to the jury during openings and closings.

Depending on the trial schedule, the outline for closing can be done the night before (or during a noon recess). If using paper, counsel should start the closing with a blank sheet over the outline, do the introduction and tell the jury that the closing has been outlined, that they will be able to follow along with a written outline, and then reveal the first page. Originally, it was important that the outline be in counsel's own printing so the presentation did not appear too slick, but still keeping it legible. Since the most current research has found that better presenters must have higher quality visual aids, Mr. Gass has switched to computer-generated charts. (See the previous section on PowerPoint.)

The outline lets the jury see where counsel is going and keeps their attention focused either on counsel or the outline. They can see how each section fits with what has come before and how it will tie into the coming sections. If counsel wants to keep them guessing, section headings are used which have catchy-sounding titles but which do not reveal what that argument will be.

Besides focusing their attention solely on counsel and the outline, the technique has the ancillary benefit of freeing counsel entirely from notes and allowing counsel to maintain absolute eye contact with the jury. It allows counsel to feel secure in that they can always look to the outline for what counsel wants to talk about next and as they look to the outline, the jury is involved in looking with counsel to the next topic.

Lastly, this technique has the advantage of demonstrating to the jury that counsel is organized and in control of the case.

Once in a while opposing counsel will use the outline to argue from. As a result, the opponent will be fighting the battle on your turf and merely repeating and reinforcing your topics and organization for the jury.

In addition, counsel can reuse the outlines that were used with witnesses. That jogs the jury's memory and reinforces what counsel did with that witness.

The same technique should be used with opening statements since jury studies show opening statements can be as, if not more, important than closing arguments in most cases. Use anatomical drawings and overlays to teach the jury about the injury and then color in the pertinent parts, or use the colored overlays from the books. Also use diagrams and photos that have been prepared and stipulated into evidence before openings.

Obviously, this technique, like all trial techniques, has to be evaluated on a case-by-case basis to see which part (or whether all) of the case is appropriate for use of the visuals.

D. TOPICAL OUTLINES FOR EXAMINATION OF WITNESSES

The outline technique can also he used successfully with witnesses, principally in the cross-examination of opposing experts or difficult witnesses, but also for the direct of an important witness whose testimony will be lengthy.

Counsel announces to the witness the area that they are going to question on as they move from area to area. The areas can be listed out on a chart and

uncovered one at a time. The other approach is to allow the witness to see all the points ahead of time and then have counsel go back and start with the first and then uncover the areas again one at a time.

The technique has a number of advantages. First, it focuses the jury as to the totality of the cross, i.e., it gives them a road map. If the areas have been uncovered one at a time, the focus is individual at first and then the whole picture is seen at the end. If all of the areas are listed out at the beginning and then revealed area by area with the whole picture apparent again at the end, repetition is achieved as well as focus. Whichever format is used, this technique signals to the jury that counsel is prepared and organized and in control. It also focuses the jury's attention on counsel, the witness, and the outline. Since the witness is only answering counsel's questions all of those are really focused on counsel. To make this technique work without legitimate objection, the area descriptions have to be fair, neutral and non-argumentative.

The one potential disadvantage of this technique voiced by attorneys who have not used it is that counsel is telegraphing the cross to the witness. That is not a problem if the area descriptions are (as noted above) neutrally stated and just cryptic enough to give only the area of questioning and not telegraph the actual questions to the witness. (Counsel also can always orally add a surprise area and insert it in the outline, as they go along.) The witness may know the area counsel is going to be examining in, but does not know how they are going to go about it. [In addition, if the yes/no technique (described below) is working, the witness is

going to go where counsel leads him.]

As a side benefit, counsel will find some opposing counsel make the mistake of going through the list of areas again on redirect. As noted above, there is nothing better for the case than opposing counsel fighting the battle on your chosen turf as all it does is repeat for the jury the areas counsel has chosen as the important ones.

The one true disadvantage (if it can be called that) of this technique is that counsel has to be so well prepared that they can be free of notes for questioning and be able to work from area to area with eye contact from the chart to the witness and to the jury. That means preparation so good that they know what they want to ask and how to ask it without having to go back to notes for the questions. The outline will prompt counsel enough so that in the long run this is not a disadvantage, because it has freed counsel from keeping their nose in a legal pad and puts them in direct contact with the witness and the jury.

Lastly, counsel can redisplay the outlines in closing to trigger the jury's recollection of an important part of the examinations,

The uses of outlines with witnesses thus include:

1. Outlines of the topics you are going to question about.
2. Charts created during their testimony of the admissions they make.
3. A chart to compare their qualifications against those of your expert.
4. The written assumptions for your hypothetical question (it gives you an opportunity to argue your case during the trial and to reinforce the verbal

argument with the same information in writing).

A trial brief (a bit aged but still accurate) establishing the authority to proceed with outlines is described in the next section. For additional reading on non-evidentiary visual aids, see: Albert H. Parnell (1986), "Use of Visual Aids at Trial," DRI Defense Practice Seminar, January *15-17,* 1986, Las Vegas, Nevada; Edward D. Crocker, "Demonstrative Evidence Techniques," *The Practical Lawyer,* January, 1959, pp. *45-68;* James W. McElhaney, *McElhaney's Trial Notebook* 2nd Ed. (Chicago, IL: American Bar Association, 1987), Ch. 40; Richard 0. Lempert and Stephen A. Saltzburg, *A Modern Approach to Evidence: Text, Problems, Transcripts~ and Cases* (St. Paul, MN: West Publishing Co., 1982), p. 1024; and Kellogg Corporation, *K-News,* Vol. V, No. 1, March 1988.

E. AUTHORITY

A trial brief for the use of outlines and other non-evidentiary visual aids to allow the jury to follow counsel's opening statement, examination of witnesses, and closing argument can be based on the following principles and authorities:

1. The Court has authority, pursuant to Federal Rules of Evidence §611(a) to allow examination in a mode most effective.
2. "Persons exposed to oral stimulators alone will retain ten percent of the information given them over a period of three days. Persons exposed to visual stimulation alone will retain twenty percent of the information given them over three days. Persons exposed to both oral and visual stimulation will retain sixty-five percent of the information over a period of three days" [LW.

Jeans, Sr., *Litigation.* (New York: Kluwer Law Book Publishers, Inc., 1986) p. 514.]

3. "The use of blackboards, charts and other visual aids at a trial is common practice. Counsel for both sides should be encouraged to present their case in a way that will be most clearly understood by the jury." *[Campbell vs. Menze Construction Co.,* 166 N.W2d 624. 626 (Mich. 1968)]

4. "What the ear may hear, the eye may see." *[Affet vs. Milwaukee & Suburban Transport Corp.,* 11 Wis. 2d 604, 614, 106 N.W.2d 274. See also J.W. McElhaney (1987), *McElhaney's Trial Notebook,* pp. 437-446; referencing also The Honorable Patrick E. Higginbotham, United States Court of Appeals, Fifth Circuit, at the Section of Litigation Meeting, Dallas, Texas, October 1985.]

F. THE COMMANDMENTS OF VISUAL COMMUNICATION

What follows is an attempt to set out some basic rules of visual communication. The following list is not meant to be definitive or immutable. Rather, it is an attempt to set out some basic rules that hopefully will help spark your imagination and point you in the right direction.

1. There Is No Helpful Innate Communicative Power for Every Visual

We frequently see advertisements come across the desk for various demonstrative evidence specialists or for example, books of anatomical drawings using the phrase, "*seeing is believing.*"

At the same time, there is another demonstrative evidence house that

advertises that “seeing is not believing, but understanding is.” At the same time we frequently hear that a picture is worth a thousand words. Our problem is that we are not necessarily concerned about the thousand words, or whether seeing is believing, or whether understanding is, but rather what we are interested in is whether or not the visual aid is going to bring us a favorable verdict. And, we have to understand the mere fact that we have blown something up or we have created a visual aid is not necessarily, in and of itself, going to bring us a favorable verdict. That visual must be thought out, the message must be clear, and it must create the right persuasive response in the jury.

Seeing is not always reality. We have all seen the picture of Richard Nixon on his the last trip on Air Force I heading back to California. The pause at the top of the steps, the turning to the group that had gathered there to send him off, the familiar Nixon swing of the arms over the head with the fingers spread in the “V” symbol. What we saw was a picture of an apparently triumphant politician, but the reality was that of a disgraced president forced from office.

It is important for us to remember as we both present visual aids and defend against visual aids during a trial that the mere seeing of an image does not necessarily guarantee to us that the jurors will see it the same way we do and see the same reality that we do. Thus, the teaching of this first commandment is that you must be very certain of the message that the visual carries and not make undue assumptions about its communicative power.

2. Visual Aids Are Not a Substitute for Good Lawyering

Visual communication can never be viewed as a substitute for a good and thorough preparation, development of case theme, credibility of witnesses and counsel, well thought out and well carried out direct and cross-examinations, and all of the rest that goes into good trial lawyering. Visual aids can help cover weaknesses and enhance strengths, but they can never be a substitute for everything that we have learned about trying cases verbally. They are an adjunct to, but not a substitute for good verbal courtroom skills.

Visuals also cannot become playtime in the courtroom. Do not become so involved with the niceties and attraction of a model or a diagram that you constantly have it in front of the jury because you enjoy it so. It should only be in front of the jury and be constantly used because it is helpful to your side of the case. Some exhibits are so enticing that you cannot seem to stay away from them. Be able to stand back and take an objective look at every exhibit and see whether it ultimately is helpful and is going to result in a favorable verdict or whether you are using it only because you like it.

3. While as a General Rule, Visual Communication Should Be Added to Every Case, Not Every Case Requires Visuals

For those who have seen the seminar presentation on which this chapter is based, you would think that the author tries cases only with a director in a TV trailer outside the courthouse in the parking lot, and that every trial displays a full array of every piece of the visual communication tools described in this paper. That is not the case, Every case must be looked at to determine the role that visual

communication will play in that particular case. For example, a recently tried dental malpractice case involved the allegation that during the removal of a wisdom tooth, damage had been done to the plaintiff's TMJ joint, causing severe damage with resultant unremitting headaches that had now totally disabled this twenty-eight-year-old male plaintiff.. The demand was the policy limits of $2 million. You would think that this would be a perfect case to use charts, models, ct cetera. The anatomy is hidden and unknown to the average jury. The case was won without a single piece of visual evidence. From our side, we really did not want an informed, well-educated jury.

4. Technological Flexibility Is Required at Trial

It almost is a black letter rule of law that if you try to anticipate the ten visuals that you will need for trial, the first one that you will need ultimately at trial is number eleven. It may be something as simple as a page of a witness's deposition to impeach them with or to help straighten out one of your witnesses on direct examination. Certainly, we can do it verbally, but if it is that important, many times the visual aid is what we need.

What you have to do is to build flexibility into your trial presentation. It means selecting visual technology, such as document camera, as one of the visual tools that you will have in the courtroom. It does not mean that you will necessarily do the whole visual presentation for the entire case on a document camera, but it means that you will be able to react as needed in trial. Whatever medium it is that you choose, you must have exercised reasonable judgment to

have the flexibility in trial to communicate visually when needed.

Technological flexibility means also that you do not lock yourself in to just one medium. By using just one medium you lose the advantages of rekindling jury interest and attention each time there is a change of media, You actually can end up diluting your message by using just one medium. You have to think also to the various points in trial where you might wish to have more than one visual displayed at the same time. Using a document camera solely, for example, you cannot have two visuals side by side in front of the jury. Simple foam boards with enlargements would allow that. Technological flexibility allows you to be presenting to the jury with an interesting, thought-out array and package of visual media.

5. Visuals as Enhancement

Remember that visuals have an effect on the jury's perception of the various presenters in the courtroom. They also have an effect on each portion of the case.

That enhancement effect of visuals should be used relative to each segment of the case, each witness, and for the attorney. What we have to do is to look at each segment of the case and see how it relates to what is going to come before it and what is going to come after it and determine whether, and in what form, visuals should be used at that point in time. We have to look to see what visuals were used in opening statements, and then look to the next witness and see if we need to vary the medium at that time or whether we can use the same medium for two or three segments of the case before we need to change it. You might also consider

using the same medium relative to liability aspects, but then a different medium relative to damages. Or you might use one medium for opening statements and another medium for examination of witnesses and then a third medium for closing arguments. Or it might be that there is one medium used with direct and a different one used with cross.

You must look also at each witness's style and keep in mind the statistical research that was set forth in the first part of this paper that, for example, shows that overhead transparencies will make a witness appear more interesting, whereas slides will make a witness appear more professional. The somewhat eccentric college professor with the tweedy jacket, the uncombed hair, the pipe hanging out of his pocket is certainly an "interesting" witness already, and perhaps needs slides for "professional" balance. The cool accountant or actuary probably needs overheads to spice up his or her presentation.

Similarly, we have to look at ourselves objectively as the presenters in the courtroom and see what type of visual aid it might be that best enhances our image as the trial lawyer. We also have to look at what media we are most comfortable with and most likely to be able to handle smoothly without any fumbling.

The bottom line is that we look at the effect and power of visual communication, not necessarily just for the substance that it can convey, but also for the ancillary enhancement benefit that it carries with it for the persons who are handling it in the courtroom.

6. Recognize the Two Types of Visual Aids in Trial

As we have noted, there are really two types of visual aids in trial. The first category is that of evidentiary visual aids. These are actual pieces of evidence. They are the actual medical records, the part of the failed product, a chunk of the concrete, an X-ray, a photograph, the plaintiff's cast, et cetera, They will be marked with an exhibit sticker. They will be formally moved in evidence. Within the judge's discretion, they will be sent back to the jury room during deliberations. There must be a foundation for them and while they communicate visually, they are evidence in the case.

The second and perhaps more important category of visual aids at trial are what are referred to as testimonial aids. These are not exhibits or evidence. They need no foundation and do not go to the jury room. Rather, they are devices that will assist a witness in communicating clearly to the jury. Consider charts and graphs and concept boards and outlines that witnesses can use to organize their testimony and to present it clearly to the jury. These are the more powerful because this is the integrated, verbal and visual presentation. The typical standard exhibit or piece of evidence is used and then set aside. It does not have the ongoing power of the verbal-visual combination.

7. Avoid Both Ends of the Visual Spectrum

At one end of the visual spectrum we have "GIGO." Just as with a computer, "garbage in/garbage out" is exactly what you get if you approach visual communication in the courtroom from this end of the spectrum. This is the

"blowup of everything in the briefcase" approach. As discussed earlier, that just will not secure a favorable verdict for you.

The other end of the spectrum is the tactic advocated by most demonstrative evidence specialists; it is what is called "Issue Focus." What most demonstrative evidence specialists recommend is that you isolate the issues in the case and then focus your visual aids just on pertinent issues. While that is a good general rule, it ignores the enhancement capability of visual aids on the impression that the jury has of the presenters (witnesses and attorneys) in the courtroom. Sometimes visuals are going to be used for the ancillary benefits of perhaps making a witness more interesting, rather than just for the pure substance of the visual aid.

The bottom line is that there really is no absolute rule other than to avoid the absolutes of either end of the spectrum and to tailor the visuals to the particular case, witnesses and attorneys involved. When we say "the attorneys involved," what we mean is not just to fit your visual system to yourself as the presenter, but also tailor it taking into account the personality of the opposing counsel as well. You must consider whether the opposing attorney is going to use a great amount of visual communication ~-or not, ~and if you know ahead of time what type of visual media that attorney will use, you should be able to take a different tack and so gain an advantage. Remember also that each time you use visual communication, you will be establishing a track record for your next opponent. The more you become locked into a particular medium or approach, the more likely it is that your opponent is the one that will gain an advantage by tailoring his or her

visual communication to your established track record.

G. CREATING VIDEO DEPOSITIONS A JURY WILL WANT TO WATCH

1. Introduction

We have all sat through them. You have watched juries and the judge snore through them. When they have been done by your opponents, you have loved it. But, when they have been your video depositions of key witnesses, you have about died—especially if your client is in the courtroom watching the debacle and the video deposition was done on your recommendation.

Trial lawyers swear by live testimony, but we all know that despite its greater persuasiveness it carries risks. Sometimes witnesses bomb despite the best preparation. Sometimes the seemingly invincible witness is cut up by opposing counsel because they finally got to work on their case and learned how to get that witness. And, in some states, lawyers are forced by physicians to accept video depositions in place of live testimony.

Attorneys admit to a fascination with the use of the TV medium in court. There almost scents to be some deeply hidden guilt that we are not able to find a creative way to use this modern medium in an age where every other activity, except the courtroom, seems to be using improved visual teaching methods. Any such guilt or fascination is usually quickly dispelled by the next botched video we see in court. This should not be the case.

Some of the reasons for putting a witness's testimony *"in the can"* are set out

above: getting their testimony before the other side develops their case, placing the witness in a less intimidating environment and decreasing the chance he/she will bomb, and adding some "high tech" to your case. An even more important reason, from the defense side, is the fact that plaintiffs' attorneys are learning how to use the TV medium faster and better than defense counsel. Some of their cases using the latest TV techniques have been quite compelling: highlighting the defective coupler in the rotor assembly used in a tragic helicopter design case; detailing complex architectural diagrams in the largest asbestos abatement case; focusing the jury on photographs of a road scene by "zooming" down the street, giving the illusion of driving; showing hard to read X-rays of an acute fracture located at C-7 and C-S. Thus, if for no other reason than to meet the enemy and fight fire with fire, defense attorneys have to learn how to not only use the video/TV medium, but to master it. The contemporaneous use of TV at trial is more complex and will be treated in other articles, This article looks just at how an attorney can create a video deposition that will compel jurors to watch and which will persuade them, When the witness or expert is presented via videotape, you do not have to lose the visual impact of live testimony.

2. The Video Medium

We all know instinctively what makes the usual video deposition boring. It is the singular focus on one individual: the witness. We all also know instinctively that what makes *"TV"* interesting is: *variety* of visual image. When trial lawyers are absolutely forced to do a video deposition (the doctor refuses to come to court,

the engineer is going to be transferred to Australia, et cetera), most at least try to use some of the usual courtroom visuals. With the doctor, they bring in a view box and have the videographer try to focus on the X-ray, hoping that, even if nothing really can be seen, this will keep the jury awake. An anatomical diagram, blueprints, photos, et cetera, are all tried the same way. It is better than using nothing, but it still is not the most effective use of the video medium.

TV is a medium that has changed American life. It has a virtual stranglehold on a significant segment of American society. Commentators constantly decry the amount of time Americans spend in front of "the tube." We can do better and really grab the jury's attention by virtue of this powerful medium in the presentation of deposition testimony. We should consider TV as a medium which extends beyond entertainment to being a *teaching* environment. Within this framework, the attorney fulfills his/her role as teacher to the jury with the TV as a learning vehicle for jurors to better understand and be persuaded by the facts and foundations of the case.

The way to do this involves three facets: the place where the deposition is taken; the technology of doing the deposition; and the ability of the trial attorney to create a series of storyboards to lay out the visualization of the deposition. We start with the place to take the deposition.

3. The Location of the Deposition

Most video depositions are done where we do normal non-video depositions: our conference room, the doctor's office or opposing counsel's conference room.

The walls are not the kind of backgrounds that any TV producer would select. The lighting was selected not for TV, but for office activities. If this witness is so important we need to put them on video, then we need an appropriate place. We need to provide a good background for the witness, preferably a deep rich curtain of the type seen behind presidential news conferences (rich royal blue, deep maroon, et cetera). We need lighting that will bring out our witness's eyes so the jury can see the "windows to the soul." We need a chair of the appropriate height, uncomfortable enough so the witness does not get too comfortable, but comfortable enough so they are not squirming. The table has to be sized so that, short or tall, the witness looks appropriate on the TV screen.

We might go so far as to use a mock courtroom at the local law school or an empty courtroom at the courthouse so that the jury sees this witness in the same setting as all other witnesses. The best setting, though, is a video deposition room of a local court reporter who has thought of all these things in advance for you and has all the appropriate technology. The court reporter also ought to be able to show you examples of good and bad video depositions and be able to help you put variety into the visual images of your video deposition.

4. Visualizing

What we want to present to the jury is a deposition that replicates the *60 Minutes* television program. This is the best example of creating video depositions that have impact. Think about Ed Bradley or Morley Safer doing a story. The typical segment is an amalgam of a little bit of Ed or Morley talking right to the

camera, documents flashed on the screen with appropriate highlighting, shadowing, circling, underlining, et cetera, with photos, video clips, and interviews mixed in. A substantial portion of America sit each Sunday night, glued to the tube, to see who they are going to skewer tonight. Time the visual portions of a segment some night. See how long they allow a single image to stay on the screen. Count how many different images they use in a twenty-minute segment. Then compare that to a typical "talking head" video deposition. *60 Minutes* is the standard that our jurors are used to watching on TV. In the courtroom, when video does not measure up, the jurors switch to a different channel just as they do at home.

We can measure up, if we do what the producers of *60 Minutes* do. We need to lay out in advance the storyboards of what this video is going to look like. Obviously, we have to lay out the questions and answers. But that is just the verbal portion of the examination. That is only half of the video. The other is the visual portion. What you need to do is to divide a piece of paper vertically in half and label the left side *verbal* and the right side *visual.* Now lay out the exam topics and your questions and answers on the left side, keeping the examination as tight and to the point as possible, keeping in mind that jurors are used to the twenty-minute segments of *60 Minutes* and half-hour TV programs that have frequent commercial breaks. Now go back to the beginning and shift to the right side, and visualize and describe what visual image will be on the camera for the jury to "see" while they *"hear"* what is on the left side of your story. What you are now

creating is the director's script of this TV show.

The idea is to make the images "come alive" to the jury in a format that is real and memorable. Using the news-investigative *60 Minutes* style to present information is both accepted and expected. It is within this context that a document camera or PowerPoint projection of photos, documents, objects, X-rays, or transparencies works dramatically.

Another important aspect of video is the ability to "zoom" or focus a person's attention on a specific detail. .No other courtroom visual medium can zoom like video, Zoom focuses attention in two ways, First, it shows the area of interest in a prominent manner. Second, it excludes surrounding visual information (we call it noise) which distracts the viewer. Taken together, you have an exhibit which is more compelling than any photographic enlargement or overhead projection. The image is just there. It can be told and seen—and there is no way for the opposition to avoid the facts.

The visuals do not have to be overly complex. For example, when the doctor refers to the history he took, you might just flash the history portion of the record on the screen. Or, when the doctor reaches his conclusions[9], have them in outline form to put on the screen as the doctor runs through them, and then as he or she goes back to explain each subpart, have only that part of the outline on the screen. That could all be done through the court reporter's character generation equipment

[9] Note: use the word "conclusion" rather than the word "opinion." Conclusion is a more forceful word with a more objective tone to it. Opinions are like noses; everybody has one.

and a document camera. As you become better at visualizing, you will find yourself going beyond the left side/right side script and dividing your exam into storyboards of the verbal and visual images of each section of your examination.

5. "They Never Taught Us This At Law School"

Right now you are probably saying to yourself, *"This sounds pretty far afield from law school, and what is the judge going to say when my opponent starts objecting to all of this?"* It is far afield from law school because law school taught us law, not how to persuade. This is the stuff of trial lawyers, not law professors. This is persuasion, not admissibility.

What the judges are going to say is, *"Good for you!"* They have sat through more boring videos than any of us have, and they are increasingly recognizing their obligation under Fed. R. Evid. 611 to allow counsel to present their evidence in the most effective manner possible. You are doing nothing in this type of video deposition that you could not do in court. You are putting up exhibits and directing the jury's attention to them and to the significant parts of them. If there is an exhibit you cannot use in court, do not use it in the deposition and you will have no problem. If this pacing and variety of presentation does not sound like the way your trials *"look,"* then it is time to re-examine your trial presentation. It probably lacks the variety and impact that persuades juries—especially in the tough cases.

6. Conclusions

Your video depositions do not have to be boring; they can have impact and can persuade. All it takes is your office (or the court reporter's) equipped with the proper video deposition room, the proper technology, and your ability to visualize and direct what the deposition will *"look"* like for the jury. (For more specific information on video deposition technology, see Section V, below.)

So,

"Lights, camera, action!"

VII. TECHNOLOGIES AND EQUIPMENT: DESCRIPTION, USE, AND COST CONSIDERATIONS

A. INTRODUCTION

The most frequently asked questions about adding visual impact to trial presentations are: what does it cost; how are we going to pay for it in these tight budgetary times; and, if you only could afford to buy one piece of this technological spectrum, which one would it be? We now will attend to answering these important questions.

All of the technology that will be discussed here is in the $1,000 to $6,000 range. The approximate prices will be set out along with the description of each piece of equipment. That range, of course, is still a substantial capital investment, especially for multiple pieces of equipment and for the smaller office. However, each of these pieces of equipment will pay for itself in a very short period of time in any office with a reasonable trial schedule, In addition, if one considers the use of these technologies out of court, such as ADR (Alternate Dispute Resolution),

settlement and deposition, the investment return will be much quicker. The machines pay for themselves by means of the office charging a reasonable rental charge to the client for the use of the equipment and for the production of the visuals. For the use of any of the equipment in the courtroom, a reasonable daily rental charge is one-half of the usual and customary rates in the community. For the production of visuals, a reasonable charge would be double the supply and labor cost necessary to produce a single visual. Thus, the cost for most exhibit blow-ups or enlargements is *$15* to $30, depending on the type of mounting and color and size of the foam board. This disbursement method not only provides a substantial cost savings to the client (typical enlargement prices, for example, start at $50 and go up astronomically), but adds substantial value to the case presentation and will enhance the probabilities of a favorable verdict,

What about the last question: *"If 1 could only afford one piece, which piece of equipment would it be?"* You really cannot consider just one piece of equipment. While each technology and technique has its own special effect, they can present substantially similar results. However, the vice of relying on one technology only can dilute your message in the courtroom. The jury can tire of one medium and individual jurors will react differently to different media.[10] In addition, each medium has its own independent message that may add or detract from a particular witness and the attorney. For example, as noted earlier, the research

[10] Kevin M. Reynolds and Lou Quinn, "A Post-Mortem Examination of the Jury," *For The Defense,* October 1990, *pp.* 8-17.

establishes that the use of slides makes the audience perceive the presenter as being more professional, while the use of overhead transparencies makes the audience perceive the presenter as being more interesting. Thus, no one technology alone can achieve the maximum impact. In addition, each time there is a change of medium, there is not only the attention-getting effect of a new visual, but the added attention accorded a new medium— you get two for one, or double your bang for the buck. Trying to find just one technology will be partially self-defeating. At a minimum, two technologies are needed. You do not necessarily need the entire spectrum, but the ability to produce, for example, different font styles and not just typewritten visuals is an essential ancillary support. However, that ability may already exist with an office's word processing equipment and laser printer.

One last thought about cost. While it is essential that the trial lawyer be intimately aware of how to make visuals using each of these technologies, this is an excellent area in which to develop paralegal expertise. Not only is the production work more economically performed by a paralegal, but most paralegals desire to learn a creative new talent and are very good at it. In addition, letting/having the paralegal produce your visuals makes you and the paralegal more of a team with the ancillary benefits that flow from that relationship.

B. ENLARGEMENTS/FOAM BOARD

Anyone who has tried more than their first case has probably used an

enlargement of some sort, whether it is a photograph, a diagram of the accident scene, a page from the hospital records, impeaching deposition testimony or statements, et cetera. The usual presentation is to have a photo lab enlarge the entire document and plaster it on a piece of white foam board. We can improve that process in two ways when dealing with exhibits that are not photos. (For photos there are other methods that carry more impact and are more cost-effective; those we will take up shortly.)

We can reduce the cost substantially and make the enlargements in-house with enlargement exhibit making systems. These machine makes 22” by 33” (or larger) enlargements from any document or black-and-white photo, and has a memory that will allow one-half of a document to be enlarged to that size, and then when the document is scanned through the machine, it will remember where it left off and blow up the second half to the same size. Seaming the two halves together gives an enlargement of 44” by 33” or 40” by 60”. Each enlargement takes only two minutes. There are over twelve different paper and color combinations (available as both regular and fax-like paper) and since the paper is on rolls, the length of enlargements is limited only by the length of the paper roll. This is a nice advantage when creating a time line, for example. This equipment has a computer interface option for an IBM PC or Mackintosh. With this, any graphics software can generate your charts and exhibits. It is quiet enough that it could be operated in the courtroom without undue disturbance.

The machines have a cost of about $3,000-$4,000 and enlargements can be

billed at between $10 and $30 for the small size and double for the 44” x 33” size. The setup and learning curve for this equipment is less than a half hour.

The enlargement sheets can be displayed with an easel without mounting on foam boards and then used in a flip chart presentation. When choosing between handwritten flip charts versus machine prepared enlargements, the clear choice generally is for machine prepared material.[11]

The other method of handling enlargements is to mount them on foam board. Better yet, there is a *reusable* Velcro frame kit (available from DOAR for $40 for the 2’ x 3’ size and $70 for the 3’ x 4’ size). The Velcro frames allow you to instantly mount any exhibit and add comments without affecting the underlying exhibit.

Three basic techniques should be incorporated into the development of your charts: summarization, extraction and process. Summarizing cases that are long and complex, with numerous events leading up to the climactic results, can be difficult to convey. Being able to condense important and intricate data, and communicate it effectively to your audience, can be difficult, Condense facts and figures; compile your own synopsis of medical history; and create a colorful enlarged exhibit. This enlargement can be mounted on foam boards. Consider

[11] There are tradeoffs between handwritten flip chart presentations and use of pre-prepared enlargements of typed/font styled script. There is an emphatic power gained in writing everything up in front of a jury, where the lawyer and the jury are experiencing the creating of the visual together. The advantage, however, is offset by the fact that to do that takes time, is usually not all that legible, and requires the lawyer to at least partially turn away from the jury. In addition, as set out in the “Why” portion of this paper, the use of handwritten visuals by a better presenter actually reduces audience reaction as opposed to the use of no visuals, For a typical presenter, the use of handwritten visuals produces little change in the willingness to commit money, although they do produce a greater impact relative to the willingness to commit time.

summary charts of hospitalization, procedures, costs, attending doctors, injury process, day-in-the-life events, etc.

The best way of displaying multiple enlargements at the same time is with a fabric free-standing display wall, easily set up, to which the foam boards attach quickly and simply with Velcro. These come with its own carrying case and costs in the range of $1,000-$2,000.

While there are times that an entire document needs to be enlarged, usually there is just a key word, sentence or paragraph that is essential for the jury to see. That is what you want the jury focused on, not having them have to search the entire enlargement to find the crucial portion. At the same time, the court and jury needs the comfort of knowing where this passage came from and seeing the entire document to see that the passage has not been altered. The way to achieve this with impact is to first enlarge the important passage on the office photocopier to as large as you can get it on 8-1/2” x 11” paper (turn it lengthwise to make it even bigger or retype it in a more columnar fashion to use more of the page). Then utilize colored foam board for the background. (There are some twenty different colors to choose from, including black which gives a very professional, slide-like appearance.) Now, off to one side or the top or bottom, mount an 8-1/2” x 11” copy of the entire document with the important passage highlighted. Then mount the enlargement and perhaps even add some lines coming off the passage out to the enlargement. Make the board look as if it is framed by using any of the various colored tapes available at artist supply stores, and you have a professional looking

visual at a reasonable cost to your client.

Frequently with diagrams there is a need to label certain parts. Label machines will produce professional labels for you. They can make self-adhesive labels in a variety of colors, types and backgrounds. Lettering can even be created to make up an entire visual just from the lettering machine.

C. PHOTOGRAPHS

Frequently, inexperienced trial lawyers present photographs to the jury by circulating small prints or holding them up so that two or three jurors at a time can view them. While there might be some small benefit from such individual viewing, it is substantially outweighed by the time involved and the disruption of the rhythm of your presentation.

The most usual presentation of photos is via expensive photo lab enlargements. With a color print, the charges for even a minimal enlargement start at $50 or $60. In addition, to get decent reproduction at the lowest cost possible requires that you have the negative. And while foam board mounting has the advantage of being able to place several photos on separate easels before the jury at one time, these enlargements allow for no further enlarging of a pertinent photo beyond the previously selected portions.

An alternative and superior method of presenting photos to the jury is to have them reproduced on overhead transparencies. This can be accomplished simply and inexpensively at a local copying shop, as long as they have a color laser copier. Either black-and-white or color photos can be reproduced on

transparencies. The usual cost is around $5.00. The quality is very high and portions of the photos can be enlarged in the process. Negatives are not needed as the transparencies are made directly from the prints.

A more flexible presentation format for photos is available with a document camera. This is actually a live video camera, and whatever is placed under the camera will be displayed on the TV screen, which you place before the jury. What makes this system so powerful is not just the fact that there is no pre-planning of which photos to use, but that it has a zoom feature which allows the attorney to come in on the smallest detail in the photo and enlarge it to the size of the screen. In addition, there is a backlit portion on the base platform which will illuminate a slide or a negative and when the zoom feature is activated, the screen can be filled with the image on the slide or negative. The negative can be displayed in either a negative or positive mode via a switch on the unit.

D. DOCUMENT CAMERAS

You have been introduced somewhat to these in the section above on photographs, but it has greater potential beyond photos. It can display anything placed under it, so any document can be displayed and zoomed in on. The display of the entire sheet, while not displaying a type size that the jury can read, is important because it gives the jury the comfort that you are quoting accurately when they see the context from which you are taking the material. Since a document camera can switch between negative and positive settings, written material can be presented in either black-on-white or with a white image on a

black background. Even more effective, while in the negative mode the color balance can be changed, and a full array of colored backgrounds with white lettering can be displayed.

A document camera vividly displays any type of document: blueprints, diagrams, charts, tables, graphs, hospital records, monitor strips, reports, articles, and so on. With proper planning, full page documents are effectively displayed by highlighting the most important area of the document by zooming. Another solution is simply to retype the pertinent portion on a sticky-note and place it right above or below the important lines. The note is just the width of a column of type, which is a perfect width for the zoom of the camera. Depositions are effectively displayed if you obtain the condensed column version from your court reporter.

X-rays are a problem in the courtroom. Usually the built-in view box is so far from the jury that they cannot see the important parts of the X-ray. While a portable view box brings the image closer to the jury, it is clumsy, and all twelve jurors cannot see the image at once. In addition, neither method allows any enlargement of any portion of the image. The back-lit portion of a document camera's base platform allows display of any joint X-ray with very good resolution and zooming.

Displays of models (anatomical, vehicles, et cetera) present the difficulty of usually being too small to display to more than two or three jurors at one time. In addition, they allow for no enlargement of any feature in and of themselves. The camera can be rotated backwards and the model set up to the rear of the unit. A

portable X-ray view box provides a good height. The model can now be turned and via the zoom feature any small detail of the model is enlarged on the screen. Since the model is constantly in the jury's view, they can look to it whenever they need to reorient themselves three-dimensionally to the model.

The document camera can be on counsel's table or placed on a small table at the middle of the jury box. The display device can then be set up at the end of the jury box and slightly out into the courtroom. It can then be seen by the judge and witness directly and all the jury needs to do is to swivel their heads. Additional monitors can be positioned on a shelf below the large unit facing different directions so that co-counsel or opposing counsel or the audience can see the display. An additional monitor for the judge can be provided at the bench.

In larger metropolitan areas, and particularly in large courtrooms, the large screen projection televisions or actual projection TV units can be used with large 10' by 10' fast fold screens.

A particularly effective use for the television technology capabilities is with depositions.

E. VIDEO DEPOSITION TECHNOLOGY

The technology necessary to create an effective video deposition is simple. First, an on-screen lettering process, "character generation," is used so that the title of the action and the usual introduction of who is testifying, date, et cetera, should all scroll onto the screen in rich gold letters against a blue background, rather than having the usual monotone introduction provided by a court reporter stumbling

through the reading of the caption *and* the other jargon that gets read before the deposition starts. In addition, character generation can also be used to title exhibits that will be shown on screen and to subtitle the introduction of the various attorneys who examine.

Second, the crucial piece of technology to creating a visually appealing video deposition is the document camera. This system, which contains an image switching device, has become a dynamic tool for both live courtroom and videotape deposition display of visual evidence. The live TV camera is mounted on an arm above a base that has back lighting capability. The camera has zoom capability and, while moveable, is usually used pointed downward toward the base, Any exhibit or X-ray now placed on the base below the camera can be captured on the videotape of the deposition by merely switching between DOAR's Presenter and the camera, capturing the witness's image through the switcher, and thus giving you the choice of image at any point in the deposition. While the witness or counsel is talking, the audio is captured no matter what visual image the camera is capturing. When you or the witness refer to an exhibit (or the crucial part of it), *that* is what will be on the screen and what the jury's attention will be focused on, just as on *60 Minutes.*

F. NO MORE "TALKING HEADS"

Mixers allow you to easily combine two video sources, such as a video camera or camcorder, in order to produce a single result for video taping or

presentation. This is very helpful, for example, for video depositions where you may want the expert speaking as a "talking head" and pointing to a critical piece of evidence at the same time being displayed on the TV screen. This effect may be produced as a "picture within a picture" anywhere on the screen, or as a split screen. A mixer will also combine the audio sources, and allow pointing and drawing on a screen to highlight key areas or superimpose text for added emphasis.

You can easily view the evidence on the entire screen with your expert in the corner or have your expert in full view. Splitting your TV/monitor to compare two documents, X-rays, or photos side by side is yet another feature of the Mixer. One may record or present live in the courtroom comparisons of signatures, photos, documents and X-rays with just a single Presenter.

G. TECHNOLOGIES: CONCLUSION

All of the equipment discussed above is in an affordable range for any office having a reasonable trial calendar and the capital investment for any piece of the equipment should be recaptured within a year or two. All of the equipment is relatively simple and easy to use. Pre-practice is necessary, but no more than an hour is necessary on any piece to achieve the utmost familiarity and comfort in using it. You do have to develop a "patter" to go along with the equipment, however, because you will periodically place an exhibit upside down, or backwards, or sideways. Do not worry about it. In fact, tell the jury in advance in opening statement what technology you will be using and that you may make a

mistake with it. It makes you appear humble and human—two qualities that juries appreciate in lawyers. And, do not panic when the light does not come on. Remember that, hopefully, you checked to make sure it was working before you went to court. Also carry along a help kit of power cords, extra bulbs, marking pens, et cetera, to anticipate your emergency needs. As part of that, be sure and carry a three-prong converter and a big roll of duct tape to tape down your cords in court so no one trips.

VIII. CORE TOPICS FOR NEUROPSYCHOLOGICAL VISUALS

Plaintiff's Credibility

e.g., accuracy of information presented, inconsistencies in information reported over time or across contexts, efforts on testing, consistency or inconsistency between characteristics shown in the clinician's office and outside the office.

Expert Bias

e.g., selectivity in reporting, "errors" that consistently favor the position taken (such as consistently undercrediting test responses), using tests that over- or under diagnose, etc. (Note: many of the other topics and examples cited below could also fit under this category.)

Procedural Errors and Mistakes

e.g., mis-scoring tests, administering tests improperly, getting important facts wrong.

Insufficient Collection of Information

e.g., failing to obtain or review materials relating to pre- or post-accident functioning, such as work records, prior mental health records, criminal records, records detailing other law suits, etc.

Treatment Compliance or Lack of Treatment Compliance

e.g., pharmacy records showing a failure to fill scripts, blood tests suggesting poor medication compliance, willingness to undergo arduous or painful procedures to try to recover.

Alternative Cause/Explanations

e.g., other much worse events which supposedly had minimal impact; previously diagnosed conditions; other more plausible explanations, such as substance abuse.

Impact on Everyday Life or Lack Thereof

Translating "Findings" to Observables and Determining if they Check Out

Fit with Expectation

e.g., is a trivial event claimed to cause grave problems or is an expert minimizing a major event; does the symptom pattern (e.g., onset, course, outcome, type of symptom) fit with expectation or does it fit better or far better with something else; fit or lack of fit with diagnostic criteria.

Examples/Illustrations of Capacities or Incapacities; and/or Continuity or Discontinuity with Pre-Event Functioning.

e.g., comparing pre-existing math abilities in an account to basic errors made

on current testing; showing excellent abilities in areas claimed to be impaired; presenting everyday examples of activities that require the skills claimed to be lost.

Culture

Claiming that something that is culturally normal is abnormal and vice versa (e.g., I had a case in which a person brought up on the equator in a very rural area defined "Winter" as the rainy season and was given no credit, and in which he "misidentified" a poor drawing of an igloo as a bread oven and was said to have "naming problems."

Treating Doctors v. Experts

Do experts on one side or the other in the case tend to line up with, or against, the bulk of treating doctors.

IX. CONCLUSION

We have spent a great amount of time on the science and technology of visual communication and it is appropriate at the end here to question how that science and technology fit with the power of verbal storytelling. There are many famous trial lawyers who advocate the art of storytelling as one of the most powerful tools that the trial lawyer has. There is a audio tape available done by a master storyteller, who tries to teach trial lawyers how to become storytellers. There is no question about the power of verbal storytelling.

Think back for a moment to how powerful Orson Welles' *War of the Worlds*

was, broadcast on the radio. The mental images that people conjured up led to mass panic across the United States. We have mentioned *The Shadow*, *Sky King* and other famous radio programs. People sat entranced around the radios and could "see" the story going on as it was being "told" on the radio. In the current radio ad campaign titled *You Saw it on the Radio,* the announcer describes a vivid scene, and, of course, with the power of well-chosen words and phrases, you can actually see it (and of course the tag line is that that shows the power of radio, and therefore people ought to advertise on the radio).

Think also about when you went to camp. Whether it was Boy Scouts or Girl Scouts or YMCA or YWCA, at some point you sat around a campfire and counselors told ghost stories. The stories were so vivid and created such images in your mind that you were scared out of your wits and you ran all the way back to your cabin or your tent afraid that whatever it was in the story was going to jump out of the woods at you.

Think also of the prices that the portraits of the masters command today. No photograph of irises commands the millions of dollars that the painting of those same irises do. And yet the photograph is of reality and the painting is of a mental image in the mind of the painter. That tells us much about the value and worth and power of the mental image as opposed to the real image. To give another example, wildlife art, while appearing very real, is most usually the result of a series of composite mental images that the painter has seen at various places in time and which come together in the wildlife artist's painting. The ducks may have been

seen over one lake at one time of the year and they become melded together with another lake scene and another weather condition from yet another time.

What does this all mean for the trial lawyer? Does it mean that we have to abandon the power of storytelling and substitute in its place the science and technology of visual communication, or is visual communication the modern day replacement for the storyteller's art? The answer really lies in the word "*art*." That is what a trial lawyer does. The trial lawyer has learned the art and craft of persuasion and the art and craft of painting mental images for the jury. The problem with storytelling and the verbal painting of mental images alone is that while you can create very vivid images in the minds of jurors, it is difficult to be assured that you have painted the same image in all twelve minds. What we need for a favorable verdict is a shared mental image that is the same among all of the jurors. That is what the science and technology of visual communication can do. It provides a greater guarantee or assurance that the mental image that we paint as storytellers is a shared image among all the members of the jury. Thus, it is not an either-or proposition, but rather a marriage of the power of storytelling with the science and technology of visual communication through the art and craft of the trial lawyer.

X. RESOURCES

1. <u>You Are The Message: Secrets of The Master Communicators</u>
   Roger Ailes
   Dow Jones-Irwin
   Homewood, IL 60430

2. Theater Tips and Strategies For Jury Trials, 2d Ed.
   David Ball, Ph.D.
   National Institute for Trial Advocacy (NITA)
   1602 North Ironwood
   South Bend, IN 46635

3. David Ball on Damages, Second Edition
   David Ball, Ph. D.
   www.nita.org

4. Persuasion, The Litigator's Art
   Michael E. Tigar
   American Bar Association
   750 North Lake Shore Drive
   Chicago, IL 60611

5. Examining Witnesses
   Michael E. Tigar
   American Bar Association
   750 North Lake Shore Drive
   Chicago, IL 60611

6. PowerPoint For Litigators
   &
   Presentation For Litigators
   Siemer, et al.
   Available at www.nita.org

7. Effective Use of Courtroom Technology
   Siemer, et al.
   www.nita.org

8. Creating Winning Trial Strategies & Graphics
   Christopher Ritter
   www.abanet.org/ababookstore

9. Beyond Bullet Points
   Cliff Atkinson
   www.sociablemedia.com

10. The Edward Tuftee Books & Materials
    www.edwardtuftee.com

a. The Visual Display of Quantitative Information
b. Beautiful Evidence
c. Envisioning Information
d. Visual Explanations: Images and Quantities, Evidence & Narrative
e. The Cognitive Style of PowerPoint