Why We Should Use Visuals to Turn Themes into Pictures

At its core, this book is about helping you win trials with effective visual images. Each chapter builds to give you substantive ideas, design guidance, and practical and legal tips for improving your jury visuals. But before I dive into discussing the tools at our disposal, or graphic design techniques, or how courts view demonstrative evidence, it's important to understand why all this matters.

Many studies have been conducted over the years on the importance of visual perception and visual communication. The consistent takeaway is that using visuals makes a difference in how humans communicate and the effectiveness of that communication. And then there's the jury setting itself—it is like no other. And that matters, too. Appreciating how jury trials are fundamentally different from other communication settings is critical to the effective design of our trial visuals.

Collectively, that's the focus of Part I of this book. I'll address the key limitations on our jurors (and on ourselves) that impact how we design and use visuals in this unique setting. I'll also discuss the critical insights we glean from studies about the power of jury visuals and why using them can make a huge difference in our cases. Finally, I'll talk about what it means to turn case themes into pictures, creating visual memories for our jurors.

Why Visual Communication Matters

Effective communication with a jury is essential to winning a trial. But the contrived setting and constraining procedural rules impose unique and substantial challenges. How do we communicate unfamiliar, voluminous, and complex material to an audience that may not begin their jury service with the background to understand it? And, the challenge gets worse. As the complexity of the case increases, the jurors' interest, comprehension, and retention all decrease. This does not bode well for accomplishing our ultimate goal of persuading the jury to decide a case in our client's favor.

The central premise of this book is that everything we say to jurors, and everything we show them, should satisfy at least one of three basic goals: we must help jurors **understand**, **believe**, and **remember** our message.
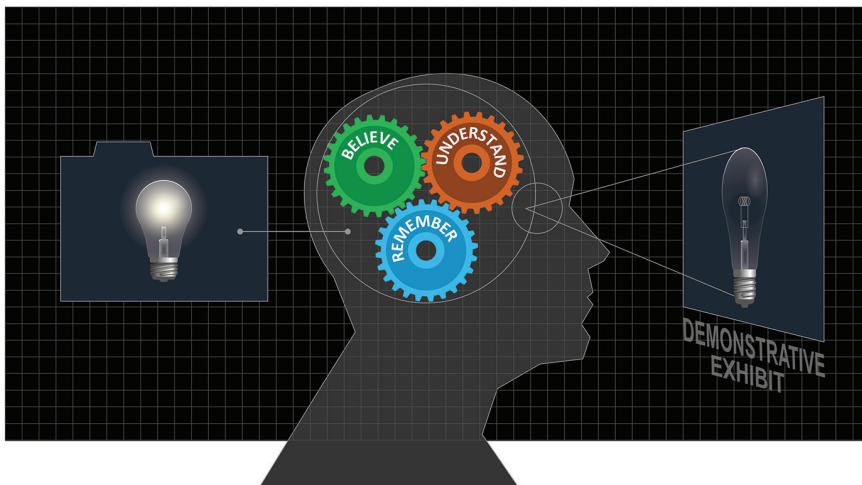
The importance of visual presentations for accomplishing these goals cannot be overstated. Many disciplines have long recognized the benefits of visuals for effective communication, from cognitive psychology and neurobiology to linguistics and the graphic arts. But the legal profession? Not so much. Most often, a lawyer's idea of a "visual" amounts to a text-based PowerPoint slide. And that's not surprising, given the nature of trial proceedings.

We give opening statements and closing arguments orally, maybe showing some text slides along the way. We elicit testimony from live witnesses through verbal questions and answers, sometimes for hours at a time. We read parts of documents into the record, either ourselves or through witnesses. Jurors are receiving all of this information primarily through auditory means, and it has very little visual impact. Sure, new witnesses take the stand, multiple lawyers are involved, and there's back-and-forth dialogue during direct and cross-examination. But very little of what's presented has visual interest beyond watching the participants speak and looking at the documents we introduce into evidence. Sometimes those documents are visually interesting. Most of the time they're not.

Certainly, some legal fields naturally are more conducive to explaining material with visual aids. But even then, the use of visuals—other than actual models or physical evidence—tends to be limited to pictures of direct evidence in the case, such as an image of the logo at issue in a trademark case, a photograph of a crime scene, or a patent diagram.

Visuals can do so much more. They're essential tools for increasing comprehension, credibility, and recall, and they involve simple techniques that are often overlooked or misapplied in the trial setting. Fortunately, there are ways to design and use visuals that will help jurors understand and remember critical facts and legal themes. They'll also increase our own credibility, including building the jurors' trust in us as their native guides through the case.

The key to increasing the effectiveness of jury communication is learning to turn case themes into visual images. This doesn't mean displaying irrelevant photos or recklessly bombarding jurors with imagery just to keep their attention—in fact, such tactics are often counterproductive for a variety of reasons that will be discussed throughout this book. Instead, identify the themes you want to communicate to your jurors, and think about how to translate them visually.

It's about taking a theme from this . . .

. . . to this.
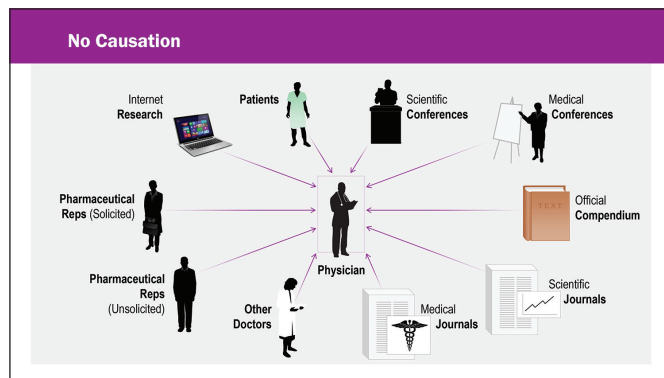
Design is about more than just making the slide look pretty; it's about enhancing the clarity of the message. When visuals are designed well and used effectively, they buttress our oral communication. I'll be sharing many design and presentation techniques with you and providing examples of how they can be successfully adapted to jury trials. The goal, of course, is effective communication in an extraordinarily unique environment.

Learning Styles

For years, those who studied learning styles explained that people generally learn through visual (seeing), auditory (hearing), or kinesthetic (feeling) modalities, and that individuals usually prefer one modality over the other two. Thus, the argument went, when presenting information to someone else, we should present it in the recipient's preferred modality, or learning style, which is how they will best learn the material. Under this approach, which became known as "meshing," if someone's an auditory learner, simply speaking to them should be sufficient. If the person is visual, add visuals to the presenta-

tion regardless of the subject matter. And if they're kinesthetic, try to involve the person in the presentation, getting them to participate and learn by doing. (That's not really an option in a jury trial beyond notetaking, but that's a separate issue.)

While all this makes some intuitive sense, more recent studies have raised questions about the validity of learning styles theory. In 2008, for example, the Association for Psychosocial Science brought together a group of psychologists and cognitive scientists to review and evaluate the prolific evidence of learning styles. Their conclusion? "Although the literature on learning styles is enormous, very few studies have even used an experimental methodology capable of testing the validity of learning styles applied to education. Moreover, of those that did use an appropriate method, several found results that flatly contradict the popular meshing hypothesis."[1] The problem, according to this evaluation, is that there's no proof that we can really measure which learning style is most effective for a specific individual. And, of course, there's not always a realistic way to modify how we're presenting information to match someone's learning style, particularly in a jury setting.

So, rather than worry about which learning method is preferred by individual jurors, or even the population as a whole (learning styles theory posits that visual learning is the most commonly preferred method), instead consider which style works best for presenting the substance of your message. Certain information naturally lends itself to a visual presentation. Anything you find yourself describing (locations, relationships, processes) can be great fodder for a visual at trial. And if there are key themes and theories you really want to make sure your jurors "get," think about turning those into visual images, as well. As the studies discussed below demonstrate, irrespective of learning styles theory, there's no doubt we can increase the effectiveness of our communication by incorporating visuals into our trial presentations.

Jurors' Challenges to Learning

Memory

Studies on jurors aren't plentiful, but what's out there is frightening. Jurors *immediately* forget as much as two-thirds of the facts we present to them.[2] That means two-thirds of what we tell jurors doesn't even make it into their short-term memory, much less their medium- or long-term memory for eventual consideration during deliberations. Add to this the challenge of remembering complex, unfamiliar information presented in an often boring setting (yes, I said it!), and juror recall plummets even further. Memory also degrades as people age—so jurisdictions that skew heavily toward older jury pools present an additional challenge for trial lawyers. While we don't need a degree in neurology to be effective trial lawyers, knowing a bit about human memory is helpful for understanding how certain visual designs—and how we use visuals in the courtroom—can be most effective with our jury.

There are actually several different types of memory. When we first perceive something, that perception is in our sensory memory. We perceive far more information than we could ever use or remember,[3] and most of this information goes no further. This is a good thing—we don't need to remember everything we see, touch, hear, smell, or taste, so instantly forgetting it helps us filter information and focus on what actually matters.

When we do pay attention to something we sense, that information passes into our short-term memory. It's only there for a matter of seconds, sometimes up to a minute, which is just long enough for us to act on the information.

To move information from short-term to medium- or long-term memory, we must consciously try to retain it. Thus, jurors must actively convert facts, case themes, and impressions into their medium- or long-term memory, or that information won't be there during deliberations.

The transfer of information from short-term to long-term memory is influenced by a variety of factors, including our motivation to remember it. How this occurs in the human brain is complex and (fortunately for us) is beyond the scope of this book. For present purposes, suffice it to say there are techniques that will help us enhance jurors' recall of key information. These include repeating key facts and themes, simplifying and controlling the flow of information presented, and—you guessed it—using visuals.

Fatigue

Then, of course, there's the ever-present problem of fatigue. As anyone who has tried more than a handful of cases knows, at some point in trial, at least one juror will nod off. What the jurors never hear stands no chance of being remembered. And even when a sleepy juror manages to keep himself awake—by clenching his teeth, squeezing his arm, or biting his tongue—his eyes might be open, but he sure isn't concentrating on the trial.

And that's just one sleeping juror. I remember reading about a study conducted in 1963 finding that sixty-six percent of jurors fall asleep during trial. I have no idea how accurate that statistic was in 1963, and I certainly don't know how accurate it is now. In fact, the current picture is likely worse, thanks to dramatic technological advances since then that have increased our expectation of receiving information immediately and in a readily digestible, often entertaining, format.

The problem of fatigue is magnified in the midafternoon hours, when our bodies naturally crave sleep. Just as conference attendees and students struggle to stay awake, so too do our jurors. John Medina, a developmental molecular biologist and the author of the fascinating book *Brain Rules*, explains the basic science behind this struggle.[4] He even cites studies demonstrating that affirmatively stopping what we're doing and taking a nap rather than pushing to stay awake will boost cognitive performance. Unfortunately, our jurors (like most of us) have no choice—they must fight through

their fatigue and keep listening to our examinations and arguments. Some will lose this battle.

What's more, for some jurors, merely serving on a jury exacerbates an already sleep-deprived existence. Jurors who rely on coffee throughout the day to stay engaged are now trapped for hours at a time in a jury box without access to caffeine. They might work multiple jobs, or night shifts, or have young children at home, or they might be going through extraordinary personal, work, or family stress. Those folks are already exhausted. Now, they have to manage work, family, and other responsibilities in addition to their jury service. So aside from the ordinary biological and neurological limitations at work, some jurors might lose concentration or even fall asleep simply because of the toll jury service takes on their already-packed lives and schedules.

Regardless of the statistics or the reasons, from my own experience of trying cases lasting days, weeks, and even months, the simple fact is that many jurors have a hard time staying awake throughout the trial. This reality has significant implications for our trial presentation.

Inattention

Even when they're awake, there will most certainly be times when your jurors aren't paying attention. It might not be every juror, and it might not be all the time, but you can count on many jurors missing at least some of your evidence presentation and argument simply because their thoughts wander elsewhere.

That said, broad proclamations about limits on peoples' attention spans are meaningless, as our attention spans are context dependent. If something is boring, it shouldn't be surprising that we'll lose interest and stop paying attention rather quickly, perhaps within the first few minutes. On the other hand, if we're interested in or entertained by something, we'll pay close attention for the duration. Entertainment streaming services have gained immense popularity in recent years, in no small part because they allow us to "binge-watch" television programs, watching hours upon hours of a program in one setting. The practice is so common that the term "binge-watch" was added to the Oxford Dictionaries in 2014. When we're interested or entertained, our attention spans seem to know no bounds.

But the converse is also true. Medina puts it succinctly: "People don't pay attention to boring things." That's actually his Brain Rule Number 6. It might sound obvious, but there's substantial science to back it up, and its implications for trial are significant.

It shouldn't surprise anyone that jurors lose focus or doze off during a trial. Trials aren't Hollywood movies, and the process isn't designed to entertain. That's not to say entertaining things don't happen during trial; it's just that the process itself isn't designed for this purpose. We might spend thirty minutes digging into a single paragraph in a dense, complex contract. Our damages expert might discuss a regression

analysis for ten minutes (which will feel like an hour to our jurors). Even in criminal cases, jurors will quickly realize that forensic testimony in a real trial isn't quite as scintillating as it is on TV. Add to that the interruptions for bench conferences, recesses, an out-of-order witness, or a multitude of other issues that arise, and it's that much more difficult for our jurors to stay fully engaged—much less fully awake—for the duration of trial.

Jurors' ability to pay attention and concentrate is affected by all sorts of factors, including fatigue, interest, age, intellect, and drug usage.[5] Post-trial interviews of jurors, not surprisingly, reveal that the lawyers' most important arguments often were missed entirely by some jurors, who don't recall ever even *hearing* them.

We also know that the brain cannot pay attention to two things at once.[6] Yet at some point during trial, a juror's mind will wander. Instead of focusing on the testimony or argument we're presenting, he'll think about a difficult problem at work, or an argument he had with his significant other that morning, or how the plaintiff's lawyer reminds him of a former neighbor. Jurors' minds don't have to wander far—they could even start thinking about their own frustration or boredom with the trial. Whatever the topic, when their attention is diverted from what's happening in trial, they're missing our message.

The Consequences

Think about what all this means by the time you get to your closing argument. Most lawyers view their closing as an opportunity to summarize and highlight trial evidence the jury *already has seen* and *already understands*. In reality, particularly in lengthy and complex trials, many of the jurors will be hearing at least some of the facts we're "summarizing" *for the very first time*. What's more, we typically won't know how much evidence didn't register, which evidence didn't connect, or how many or which jurors didn't get it all.

Not surprisingly, then, "[e]xtensive research indicates that jurors make decisions using a very limited number of facts. Even in extremely complex cases with hundreds of facts presented, jurors will *selectively retain only three or four facts* which they perceive to be the most salient. . . . Simply put, the average juror cannot sort and process large amounts of factual data, but will minimize the complexity of the case, choose a few issues he or she understands or perceives to be most pertinent, and fit all other data into this framework."[7]
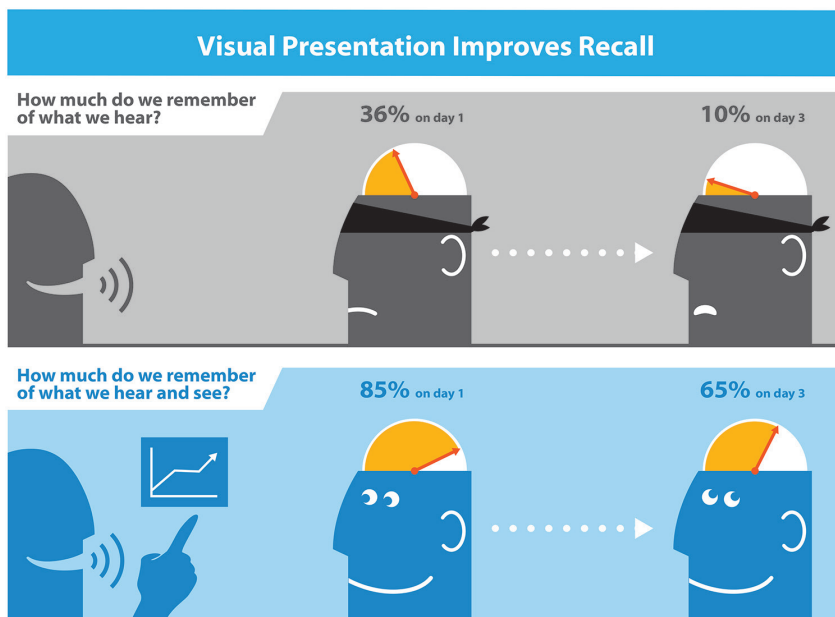
How Visuals Help

Fortunately, the research also suggests what we can do to help our jurors, and thereby, help ourselves and our clients. Studies consistently find improvements in recall, both

immediate and over time, when a visual component is added to the information presented.

One of the most often-cited studies on the topic was sponsored by 3M Corporation in 1986.[8] Researchers from the University of Minnesota and at 3M examined how the use of visuals affects the persuasiveness of a presentation. To be clear, the presentation in the 3M study wasn't a trial. It was a ten-minute videotaped presentation, shown to nine groups of college juniors, that attempted to persuade the audience to commit time and money to attending time-management seminars.[9] One group saw the presentation without visual support, and the remaining eight groups saw presentations with one of the types of visuals tested (color vs. black and white, the use of plain text vs. clip art and graphs, and (given the study's age) the use of 35mm slides vs. overhead transparencies).[10] The study found that, overall, presentations using visuals were "43% more persuasive."[11] In particular, the audience's attention, comprehension, yielding (the degree of agreement with the presenter's position), and retention were enhanced by the use of visuals.

In the years since the 3M study, some have questioned the robustness of its results. But subsequent studies on using visuals in presentations support the basic findings of the 3M study—that the use of visuals enhances audience comprehension and retention.[12] Boyll's study, for instance, found that people retained only 14 percent to 33 percent of information presented through purely auditory means, but 85 percent of that same information when it was also presented visually.[13] Similarly, Medina notes that after three days have passed, we remember only 10 percent of information presented verbally, but 65 percent of information presented both visually and verbally.[14] Hence, Medina's Brain Rule Number 9—"Vision trumps all other senses."[15]

Visual Presentation Improves Recall

How much do we remember of what we hear?   36% on day 1   10% on day 3

How much do we remember of what we hear and see?   85% on day 1   65% on day 3

Researchers have known about this "pictorial superiority effect" for over one hundred years. As Medina explains, "the more visual the input becomes, the more likely it is to be recognized—and recalled."[16] And for our present purposes, that matters a lot.

Indeed, multiple studies conducted with mock jurors are consistent with the studies on presentations generally. For example, mock jury studies have found that visual displays can enhance jurors' attention and recall.[17] A 2011 study of 1,375 mock jurors found that the consistent use of visuals increased the jurors' ability to understand and remember the defendant's causation arguments when compared to the same presentation made without the use of visuals.[18] And, mock jurors who received information throughout trial by visual means (such as imagery and charts) had better recall of causation arguments and damages numbers, which were the variables tested.[19]

One mock jury study even found that visuals increase jurors' overall level of engagement, motivating them to decide a case more accurately.[20] This is particularly helpful in light of the reality that jurors, by definition, have no personal stake in the outcome of the case they're deciding—an issue that will be discussed further in the next chapter.

And as for those text-based PowerPoint slides, two unpublished mock jury studies underscore what biology, neurology, and psychology—as well as common sense and our own shared experience—have told us for years. Showing a bunch of words on a screen does not magically create an effective visual. In one study, the plaintiffs featured graphs on their PowerPoint slides to visually illustrate statistical evidence. Those slides were found to have increased the defendant's judged responsibility.[21] In the other study, text slides that merely summarized an expert's testimony had no effect on the jurors' judgments of guilt.[22] It really is true—just typing your message onto a slide, without more, doesn't suddenly turn your spoken message into a visual image.

So that's what the rest of this book is about. Think about your case visually, integrate those visuals into your trial presentation wherever you reasonably can, and design your visuals to maximize the clarity of your message.