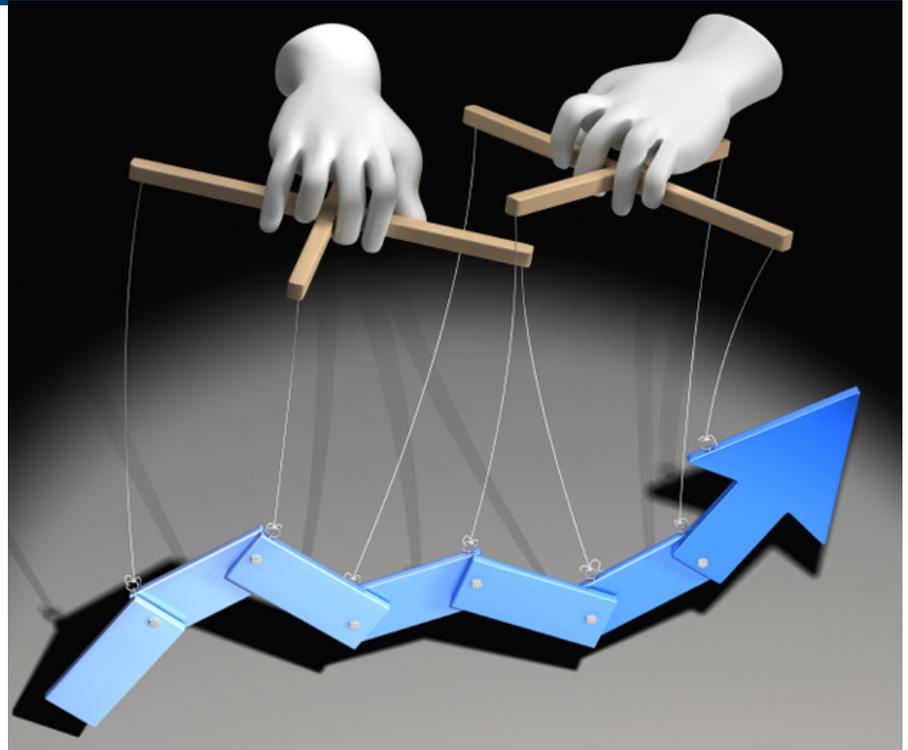




## **Trial Advocacy: Truthiness, Falsiness, and Nothingness**

by Kathy Kellermann, Ph. D.



**T**RUTHINESS, FALSINESS AND NOTHINGNESS occur in litigation and legal advocacy. Advocates and litigation consultants routinely try to use truthiness and falsiness to influence decisions and verdicts in their clients' favor, and seek to avoid nothingness. However, jurors tend to follow the evidence, and so despite everyone's best attempts, nothingness also happens.

What are truthiness and falsiness in legal advocacy? Truthiness in legal advocacy occurs when information that is non-probative (i.e., non-diagnostic) of a claim nonetheless increases the perceived truth of the claim in the mind of a legal decisionmaker (e.g., jurors, judge, arbitrator, mediator, opposing attorney, witness, etc.). Falsiness is just the opposite, occurring whenever information that is non-probative (i.e., non-diagnostic) of a claim nonetheless decreases the perceived truth of the claim or fact in issue in the mind of a legal decisionmaker.

Newman and Feigenson (2013) provide important insight into how non-probative visual images affect people's judgments of the truth of a claim, and outline important implications for trial advocacy. Though not mentioned in their article,

other articles by them and associated authors offer additional and intriguing information about truthiness and falsiness. For example, truthiness of visual images is not a temporary response to a visual image; truthiness "sticks" over time (Finn et al., 2013). While truthiness can occur by using related though non-probative visual images, falsiness can occur by using visual images unrelated to a claim (Newman, 2013). Not everyone is subject to truthiness: 30% to 40% of people were not affected by truthiness in their research (which leaves a substantial majority, 60% to 70% who were affected by truthiness) (Newman, 2013). More than visual images can cause truthiness: non-probative verbal information also can increase belief in the truth of a claim (Newman et al., 2012).

In this article, I make three points about truthiness and falsiness: (1) Truthiness and falsiness from non-probative visual images can occur, but so can nothingness; (2) Truthiness and falsiness are much broader phenomena in trial advocacy and are not limited only to non-probative visual images, and so is nothingness; and (3) Truthiness and falsiness are tactics that can be used to counter nothingness, but other tactics exist to turn truthiness and falsiness back into nothingness.

## Visual Images and “Nesses”

In trial advocacy, I accept, based on both experience and research such as Newman and Feigenson’s (2013), that purely decorative and metaphorical visual images can influence the perceived truth of a fact in issue. Trial graphics are often designed by litigation graphics consultants with this exact intent in mind.

Litigation graphics consultants rely on the same principles as advertising experts who employ non-probative visual images to encourage people to believe claims about products (e.g., a car is a better car because a sexy girl is selling it). Though written over a decade before Steven Colbert coined the term “truthiness,” Paul Messaris’s (1997) book entitled *Visual Persuasion: The Role of Images in Advertising* provides an insightful analysis of how non-probative visual images used in advertisements get people to believe product claims through “visual truths” and “visual lies.”

One technique used in advertisements is to alter the size of what a viewer sees in order to alter the belief in a claim. Litigation graphics consultants also use this technique. I will never forget seeing the defense in the first O.J. Simpson criminal trial in 1995 use a *huge* poster board showing a *huge* vial of blood, with the contested 1.5 mL of “missing blood” visually appearing to be a *huge* amount of white space on the poster board, even though it was only a very small proportion of all the blood initially drawn and, in reality, a very small amount. Given the large white space in the vial on the poster attributed to the “missing blood,” it became much easier for jurors to believe that this blood was *lost* or *taken* rather than *unaccounted for* because of simple measurement error or drops that stuck to the side of vials when blood samples were taken for testing. The picture of a large white space labeled as missing blood in a vial on a poster board bigger than most people are tall created belief that the blood was missing based on non-probative evidence (an illustration). Had jurors been shown an actual vial with 1.5 mL of blood in it, I believe that the claim of “lost blood” would have been much less persuasive.

Non-probative aspects of trial graphics, animations and videos can influence verdicts. Newman and colleagues (Finn et al, 2013; Newman, 2013; Newman & Feigenson, 2013; Newman et al., 2012) provide strong evidence that accompanying a statement with an image that is non-probative can cause truthiness and falsiness. Studies of videotaped confessions and computer animations demonstrate how the *perspective* taken in the video, a non-probative matter, causes truthiness. Evaluations of videotaped confessions can be altered by small changes in the camera perspective taken when the confessions are recorded. Videotaped confessions recorded with the camera focused on the suspect (as compared to videotapes from other camera points of view, such as on both the interrogator and suspect or only on the interrogator) lead mock jurors to judge that the confessions are more voluntary and the suspects more likely to be guilty (Lassiter, 2002; Lassiter et al, 2002). Computer animations of traffic accidents prepared for an actual court case

more than doubled the hindsight bias of mock jurors, that is, the computer animations made it twice as hard for mock jurors to reconstruct the accident from the perspective of the driver in “real time”. Those mock jurors disregarded knowledge of the outcome of the accident because the animation took an overhead perspective rather than the perspective of the driver (Fessel & Roese, 2011; Roese et al., 2006). Truthiness can occur with the full range of litigation graphics.

Design choices in creating displays of numerical information can create both truthiness and falsiness. For example, changing a graph’s height relative to its width can greatly change the *visual* perception of the slope of lines in the graph, which alters people’s characterization of the relationship. For the exact same data, a graph’s aspect ratio can be change from a steep to a shallow trend line, and the steeper the line, the more people characterize the relationship depicted as sharply increasing, and the more horizontal the line becomes, the more people characterize the relationship depicted as slightly increasing. The data have not changed, only the non-probative way it is presented. Similarly, people can be encouraged to overestimate and underestimate differences by choosing to represent data with areas of circles and volumes of boxes rather than with pie charts or bar charts (see, Kellermann, 1998). Trial charts of numerical information are often designed with nonprobative features to create truthiness and falsiness.

Despite the regular design of trial graphics to encourage the truthiness and falsiness, these effects do not occur whenever non-probative information is used. Some animations produce truthiness, while others produce nothingness. For example, Bennett and colleagues (1999) found that animations had no effect on damage awards or on the percentage of fault assigned to the plaintiff and defendants in a car accident trial, and Dunn (2002) reported that a plaintiff’s plane crash simulation reversed verdicts from the defendant to the plaintiff, but that a car accident animation had no effect on verdicts rendered. Similarly, some visual images produce truthiness, while others produce nothingness. For example, McCabe and Castel (2008) found that an academic article was perceived as more scientifically reasonable when it was accompanied by a realistic image of a brain, but not when accompanied by a bar chart. The use of a non-probative photo did not guarantee truthiness. Similarly, presentations of numerical information may as easily produce nothingness as truthiness or falsiness. Many numerical displays are sufficiently difficult for jurors to comprehend that they are unable to extract useful information from the graphic (Kellermann, 1998). The attempt to encourage truthiness or falsiness may result in nothingness.

Use of nonprobative visual images also can backfire, producing falsiness when truthiness is desired. Falsiness can occur when *unrelated* photos are paired with claims (Newman, 2013), an outcome all too easy to elicit if jurors do not understand the relationship between a visual image and a claim. A backfire effect can happen even when related nonprobative photos are used if they are paired with warnings or to discredit myths

(Newman, 2013). In one study, repeated warnings about myths led older adults to remember the myths as facts, and not the information regarding their inaccuracy (Skurnik et al., 2005). In my opinion, disrespectful photos that violate jurors' standards for decorum in the courtroom also could backfire, such as in the Jim Fayad case when a prosecutor disdainfully asked "If this defendant didn't do it, who did? Batman?" and showed a Batman slide, and said "The defense is offering you a buffet of explanations" and showed a buffet slide. This behavior caused a juror in the case to rant angrily against the prosecutor's PowerPoint slides [in a blog post](#). Backfire effects might also occur when people take different messages from the same photo. Recently, I was asked to look at a picture of a criminal defendant who pled insanity due to delusions of being a Nazi guard at a prison camp where he believed he was acting under proper (Nazi) authority when two people were marched into an abandoned bunker and shot. The criminal defendant looked very pleasant, nice and "soft" in the picture, and the attorney wanted to use the picture to show the defendant's vulnerability. I looked at the picture and thought *how sane* the defendant looked in the picture, and recommended against its use in opening. The message a photo sends to one person, can be exactly opposite of the message it sends to another. The attempt to create truthiness might create truthiness, but also might result in nothingness or may even backfire.

Trial graphics may also fail to produce truthiness or falsiness because they are "individual graphics", rather than an immersive graphic experience of continuous images. Persuasion Strategies' Visual Persuasion Study reported by Broda-Bahm (2011) found that the occasional use of graphics was not enough to influence jurors, and jurors instead must be immersed in graphics throughout a trial to see an effect of trial graphics on jurors' decision-making. To date, the research on truthiness and falsiness in trial graphics is not contextualized in long and ongoing trials in which graphic immersion occurs. Rather, the research looks at individual graphics that might be easily countered or overwhelmed by ongoing and repeated trial arguments and evidence in actual trials. Truthiness and falsiness are small effects in the research (Newman, 2012), most often found when the evidence is uncertain and ambiguous, and it is my belief that even if a number of non-immersive graphics were used, they would be unlikely to be able to overcome the more certain and unambiguous verbal arguments and evidence *unless* one or more graphics personifies vividly the case theme, such as the non-probative ATM graphic used to illustrate a plaintiff lawyer's theme that the defendant company's new management had treated the company like an ATM (Feigenson & Spiesel, 2009). In my experience, most trial graphics are neither this vivid, nor do they address directly such a central matter, nor do they occur in the context of ambiguity and uncertainty, nor are they immersed in a graphics environment. The graphics are thus less likely, as individual graphics, to be able to sustain the small difference produced in truthiness or falsiness in the context of all trial arguments and evidence.

Trial graphics, even if immersive, may still fail to produce

truthiness or falsiness due to their quality. Not all trial graphics are created equal, and some graphics do not communicate well their intended message. I believe that tests of graphics (e.g., at mock trials or through online focus groups) can determine if they produce truthiness or falsiness as individual graphics, and these pretrial tests of graphics are an important part of trial preparation. If the test is conducted during a mock trial, jurors can be immersed in a continuous graphic display with individual graphics tested for their truthiness, falsiness, nothingness, and any backfire effects. Truthiness and falsiness from non-probative visual images *can* occur in trial graphics, but so can nothingness. Even though the effect is small, and nothingness may occur, still I believe that truthiness and falsiness are important to consider whenever designing trial graphics, both to prevent backfire effects and to capitalize on every possible tactic that can be used to persuade jurors to accept the arguments and evidence being forwarded. One juror can change a verdict, and a slight change in belief can change a juror.

### **Trial Advocacy and "Nesses"**

Truthiness and falsiness extend far beyond non-probative visual images, and can arise from almost anything related to trial advocacy. Examples of truthiness and falsiness in trial advocacy abound.

Truthiness or falsiness can occur when a promise in opening statement goes unfulfilled – which "ness" occurs depends on whether the opposing attorney points out in closing the unfulfilled promise. In one research study, when a prosecutor failed to point out that a promise by a defense attorney in opening was not fulfilled, the defendant was acquitted more often. The unfulfilled (and non-pointed out) promise had increasing impact over the course of the trial on mock jurors' belief in the defendant's innocence: the judgments of mock jurors who did and did not hear the promise in opening grew further apart as the trial progressed. However, if the prosecutor alerted the mock jurors in closing that the defense attorney made an unfulfilled promise about the evidence in the opening statement, falsiness occurred and the mock jurors became less sympathetic to the defendant in their verdicts (Pyszczynski et al., 1981). A promise in opening never alters the actual evidence of a trial, and so is non-probative, yet it nonetheless can influence jurors' beliefs.

Falsiness also can occur when attorneys ask expert witnesses leading questions. The questions are not evidence, and so not probative of an expert's credibility; the answers are evidence. Kassin and colleagues (1990) tested whether mock jurors' perceptions of an expert witness can be influenced by leading cross-examination questions. Mock jurors heard a cross-examiner ask two questions of an expert witness that implied something negative about the reputation of that expert (*Isn't it true that your work is poorly regarded by your colleagues? Hasn't your work been sharply criticized in the past?*). One third of these mock jurors also heard a denial from the expert (*No, it isn't; No, it*

*hasn't*), one third heard an admission from the expert (*Yes, it has; Yes*), and one-third heard objections to the questions from an attorney that were sustained by the judge and then withdrawn before the witness had a chance to respond. There was also a group of mock jurors who did not hear the leading cross-examination questions. The expert's honesty, believability, competence and persuasiveness were significantly diminished by the leading questions. The expert was less credible to jurors even when the expert flatly denied the charge or the attorney won a favorable ruling on an objection. The technique of cross-examination by innuendo can be highly effective in creating falsiness.

Truthiness and falsiness also can occur when witnesses testify to trivial and peripheral details. In one research study, a man stood accused of murdering a store clerk during a robbery and eyewitnesses described store items that the defendant had bought as either *a few store items or Kleenex, Tylenol, and a 6-pack of Diet Pepsi*. The specific store items were peripheral details and non-probative as to the defendant's guilt or innocence. When the prosecution eyewitness offered the detailed list of items, truthiness occurred and jurors were more likely to find the defendant guilty (Bell & Loftus, 1988). Even when the eyewitness said that the detailed list of items was purchased by another person in the store other than the defendant, judgments of guilt were still influenced (Bell & Loftus, 1989). Falsiness can occur, however, when trivial details in testimony are refuted. In one study, mock jurors were presented contradictory testimony from two eyewitnesses to a car accident, one of whom included unnecessary and trivial details which were then discredited. After the trivial details were refuted, the credibility of the witness presenting the trivial details decreased *and* the credibility of the other witness who had no offered trivial details increased *despite* no change in that witness's testimony (Borckardt et al., 2003). Similarly, exposing inconsistencies in testimony through cross-examination of a prosecution witness reduced conviction rates regardless if the inconsistencies were central facts or peripheral details (Berman et al., 1995). The offering of peripheral details in testimony can cause truthiness, and rebutting those details can cause falsiness.

Falsiness also can occur when witness testimony is shown via videotape instead of testimony occurring live. In one study, mock jurors viewed the same witness testimony either live or on videotape. Observers of the live witness testimony rated the testimony in a more positive way than did observers of the same testimony viewed via videotape. (Landstrom et al., 2005) The medium of the testimony is non-probative as to witness credibility, yet observers distrust witness testimony more when presented via videotape.

Falsiness also can occur when non-native speakers of English testify in court. Accents often make it hard for jurors to understand what witnesses are saying. Lev-Ari and Keysar (2010) studied the impact of accent on speaker credibility. Native-English speaking Americans were asked to judge the truthfulness of statements recited by others such as "Ants

don't sleep" and "A giraffe can go without water longer than a camel can." The statements were recited by speakers having no accent in English, a mild accent (Turkish, Polish or Austrian-German) or a heavy accent (Turkish, Korean or Italian). Despite knowing that all speakers were reciting from a script, the listeners judged as less truthful the statements coming from the non-native speakers of English. The more severe a non-native speaker's accent, the greater the decline in the speaker's perceived truthfulness. The credibility of non-native speakers was impaired regardless of whether the content of the statements was familiar or unfamiliar to listeners, or factually true or false. Listeners misattributed their own difficulty in understanding the speech of non-native speakers to a reduced truthfulness of the speakers' statements.

Both truthiness and falsiness can occur in response to a defendant's physical characteristics. Zukier and Jennings (1983-1984) gave mock jurors information that was diagnostic of guilt in a murder case, with some mock jurors given additional information that the defendant was of average height and average vision and some others told the defendant was extremely tall and had extremely good vision. These physical characteristics, whether average or extreme, were non-probative: they were nondiagnostic of guilt in the case. Mock jurors told the defendant had extreme height and vision were as likely to find the defendant guilty as mock jurors who had no information about the defendant's height and vision. However, jurors told the defendant had average height and vision were more likely to acquit the defendant. The researchers concluded that "extremeness" in one category (height and vision) is related to "extremeness" in another category (likely guilt), and that "typicality" in one category (height and vision) is related to typicality in another category (innocence). In my experience, physical characteristics also can cause falsiness. Many jurors think that plaintiffs and defendants physically look liable or guilty, and jury consultants often dress and present litigants physically to counteract these concerns. Gender and race are physical characteristics that can influence truthiness and falsiness. For example, women and minorities are substantially disadvantaged in bringing age, race and sex discrimination claims, winning from one-half to one-third as often as men and whites (Oppenheimer, 2003). Black defendants are disproportionately convicted and given the death penalty than white defendants (see, Death Penalty Information Center), though acquitted more often when pleading not guilty by reason of insanity (Poulson, 1990) and when charged with crimes jurors typically associate with white defendants such as embezzlement or white collar crime (Gordon, 1990; Gordon et al., 1988; Rickman, 1989). Height, vision, gender, race, age, weight and other physical characteristics are only rarely probative, and can cause truthiness and falsiness.

Falsiness and truthiness also can occur based on a litigant's demeanor during trial. For example, the amount of emotion a criminal defendant displays while sitting at counsel table during trial can influence conviction rates. In one research study, a defendant displaying a low, as opposed to a moderate or high,

level of emotion was judged more guilty and less credible when the evidence against the defendant was weak; when the evidence was strong, the defendant's emotional display had no effect on the conviction rate (Heath, Grannemann & Peacock, 2004). In another research study, a criminal defendant's impassive demeanor resulted in a harsher recommended sentence in a simulated capital case (Antonio, 2006). In yet another study based on a real manslaughter case, 60% of mock jurors voted for manslaughter when seeing a remorseful facial expression on the defendant, whereas 100% voted for manslaughter when the defendant's expression was neutral or angry – and all jurors were given identical case evidence (MacLin et al., 2009). A litigant's demeanor is not probative, but nonetheless influences beliefs.

Truthiness also can occur by an attorney's use of persuasion tactics such as repetition of an claim or stealing thunder. Assertions that have been repeated just once are perceived as more true than assertions heard for the first time, even when the person making the assertion has been lying repeatedly (Begg, Anas & Farinacci, 1992). Repeating an argument does not prove an argument, and so repetition is non-probative, yet mock jurors agree more with an attorney's recommendation when arguments were repeated three times, rather than once (Wilson & Miller, 1968). Repetition does have limits in its ability to cause truthiness: The truthiness arising from repetition disappears if the argument is weak or people are paying close attention (Moons et al., 2008), and repeating an argument *three times* and using *repetition on a theme* (rather than word-for-word repetition) are common guidelines for effective use of repetition. Stealing thunder occurs when an attorney reveals potentially incriminating evidence first (before the other side can) for the purpose of reducing its negative impact on jurors or other decision-makers. Stealing thunder does not change the information, and so is not probative, yet can reduce the negative impact of the incriminating evidence even when the importance of the negative information is not downplayed or the opposing attorney also mentions the evidence (Dolnik et al., 2003).

These are just a few examples of how truthiness and falsiness can arise from diverse extralegal factors advocates confront in the courtroom. I have seen these and other extralegal factors influence verdicts. Nonetheless, in my experience, truthiness and falsiness influence verdicts much less than many might suppose. First, truthiness and falsiness are most evident when evidence is ambiguous or weak, rather than strong and clear, and the evidence in most cases that go to trial tends not to be ambiguous or weak. Second, jurors tend to follow the evidence, rather than the truthiness and falsiness arising from extralegal factors. One of the most enduring takeaways for me from mock trial research and post-verdict interviews of jurors is that jurors tend to follow the evidence.

Social science research differs from what is experienced in actual trials in ways that I believe lead to extralegal factors such as non-probative photos, unfulfilled promises, leading questions,

peripheral details, videotaped testimony, accents, physical characteristics, demeanor, repetition and stealing thunder to be highlighted in research results, and overshadowed by evidence in trials. In many studies, jurors read case materials, rather than see presentations of the case. The case materials are summaries of evidence that often minimize evidentiary issues. Written case materials often are presented without visual material and respondents have only a sense of “paper people” for the defendants, attorneys and witnesses. If visual presentations are used, they usually are videotaped for reasons of experimental control that, unfortunately, sometimes sacrifice the generalizability of the results to the complexity of actual courtroom situations. I believe that the non-probative extra-legal factors that produce truthiness and falsiness increase in importance against the impoverished information environments of experiments wherein evidence is not accentuated.

Studies of actual trials, where evidence is almost always accentuated, find that jurors' decisions are dominated by evidentiary issues rather than these extra-legal factors (Visher, 1987). The results of these studies consistently show that the most powerful determinant of jurors' verdicts is the strength of the evidence, and the side that presents the strongest case generally prevails (Feigenson, 2000; Overland, 2008). Data from actual trials show that jurors are considerably less responsive to extra-legal characteristics of victims and defendants than they are to the evidence (Visher, 1987). I wonder about the extent to which truthiness and falsiness influence verdicts in actual trials as compared to the less rich information environments of the research studies, and the strength of the evidence in those cases.

That said, in my experience, sometimes truthiness and falsiness occur in actual trials, and when they do, attorneys must deal with their occurrence.

### **Turning Truthiness and Falsiness into Nothingness**

What is an attorney to do when opposing attorneys use extra-legal factors and create truthiness for themselves or falsiness for one's own claims?

*Judicial Instructions.* As Newman and Feigenson (2013) noted, judicial instructions have difficulty overcoming cognitive biases and so are unlikely to be able to overcome truthiness and falsiness. I concur. Lassiter and colleagues (2002) directly tested the usefulness of judicial instructions in their study of the camera angle of videotaped confessions, and found that a corrective judicial instruction was insufficient to mitigate the prejudicial effect that the typical camera perspective of the suspect had on mock jurors' assessments of the voluntariness of the confession or their verdicts. However, some judicial instructions work to some degree sometimes, and usually do not produce backfire effects, so that asking for a judicial instruction has little risk and sometimes a reward. For example, Levi-Ari and Keysar (2010) found that asking listeners to consciously attend to the difficulty in understanding non-native speech

partially corrected the biased judgments of the truthfulness of non-native English speakers with mild, but not heavy, accents. A judge could instruct jurors and ask them to attend to their difficulty in understanding the speaker's accent, and separate that from their judgments of a witness's truthfulness. While I would ask for an instruction in the hopes it might have some effect, I agree with Newman and Feigenson (2013) that other solutions are needed to respond effectively to attorneys from the opposing side using truthiness and falsiness.

*Exposure.* Based on my experience and research on persuasion, I believe that one of the most effective responses an attorney can make to an opponent using truthiness and falsiness is to expose the persuasive tactic the attorney is using. For example, I am frequently asked how to handle an opposing attorney who repeatedly asserts a claim that in fact was unproven but *seems* to be a truthful fact because of the repetition. I advise the attorney who called me to:

- (a) *label the tactic* the opposing attorney is using (“repeating”)
- (b) *explain the tactic’s truthiness or falsiness* (“we tend to believe statements that are repeated are true, which is why commercials and propaganda works so well”)
- (c) *identify when the attorney used the tactic* (“repeated here, repeated there, ...”)
- (e) *explain what the tactic can’t do* (“repetition isn’t proof, it is just repetition and so you still haven’t heard evidence that supports the opposing attorney’s claim, or evidence that refutes our claim that ....”)
- (d) *explain the tactic is used to distract jurors from the evidence* (“the opposing attorney is hoping you won’t notice he/she has no evidence to support his/her claim and to refute ours”)
- (e) *warn jurors to put their guard up against the tactic* (“every time the opposing attorney repeats the claim, ask yourself ‘where is the proof?’”)
- (f) *provide your evidence* (“here is why he/she can’t provide that evidence, because we’ve proven that....”)

This exposure method could be used with virtually any extra-legal factor giving rise to truthiness or falsiness. This exposure method provides a warning (helping jurors guard against further use of the tactic), exposes the opposing attorney as using “tactics” (being tricky, having a persuasive goal) rather than “informing” (having an informational goal), and refocuses the argument on the evidence (which jurors prefer to follow). People do not like to be manipulated, and this exposure method lets people know what an opposing attorney is trying to do. When people are forewarned about another’s persuasive intent, they put their guard up, even against subliminal messages (Verwijmeren et al., 2013).

This exposure method can counter truthiness and falsiness, and turn them into nothingness. For example, stealing thunder (where an attorney reveals potentially incriminating evidence before the other side can for the purpose of reducing its negative impact) is no longer effective when it is revealed that the stealing thunder tactic has been used on people (Dolnik et al., 2003). The persuasive effect of making a promise in opening is nullified when an opposing attorney points out to

jurors in closing that the promise went unfulfilled (Pyszczynski et al., 1981). Raising the issue of racial biases in voir dire can reduce guilty verdicts with fewer mock jurors finding a black defendant guilty when the issue of racial bias was raised on a juror questionnaire than when it was left unstated: Only 24% of mock jurors who were asked questions about race on the juror questionnaire voted guilty compared to 47% who were not asked questions about race on the questionnaire (Sommers, 2006). I recently worked on a public corruption case where the defendant was beyond morbidly obese and physically looked like he literally had “fed at the public trough.” We addressed this matter directly, asking on the juror questionnaire if the defendant physically looked guilty. The point here is to raise the issue of persuasive techniques, a defendant’s characteristics (race, religion, gender, weight, age, etc.), or any extra-legal factor to expose and obviate the truthiness and falsiness they create, as well as challenge jurors for cause and use peremptories on jurors who cannot set truthiness and falsiness aside.

*Countering.* Truthiness and falsiness created by an opposing attorney can be countered as well as exposed. For example, the use of non-probative information in litigation graphics can be countered effectively with your own animation or video, changing perspective in an animation or video, and/or replacing a video with transcripts and text. Recall the study where the plaintiff’s plane crash video reversed verdicts from the defendant to the plaintiff. When the defense countered the plaintiff’s animation with an animation of its own, verdicts shifted back in favor of the defendant (Dunn, 2002). For videotaped confessions, changing to a camera perspective that focused mock jurors’ attention on the interrogator helped jurors better detect coercive influences occurring in the interrogation and improve their assessments of the confession’s reliability. Transcripts and audiotapes also circumvented the prejudicial effects of the camera focusing on the suspect during an interrogation (Lassiter et al., 2002). Creating an animation of a car accident from the point of view of the driver, rather than from an overhead perspective, can reduce the belief that the situation could have been avoided. When mock jurors were placed in automobile driving simulators (so they had the perspective of drivers, rather than an overhead perspective of the entire set of events), the hindsight bias induced by the overhead perspective mostly disappeared (Fessel & Roese, 2011). Finally, immersing jurors in continuous graphics of your own can create the conditions for your graphics to influence jurors more than individual images of the opposing side. Countering the truthiness and falsiness created by the opposing side’s trial graphics can make turn truthiness and falsiness into nothingness.

Truthiness and falsiness in witness testimony can also be countered by discrediting testimony, undermining a witness’s confidence, and hiring professional actors to read deposition testimony live to jurors. The credibility of an eyewitness testifying to trivial and peripheral details (“*Kleenex, Tylenol, and a 6-pack of Diet Pepsi*”) decreased when the trivial details were refuted. This eyewitness’s loss was a gain for the other

eyewitness who hadn't testified to those details ("a few store items"), despite no change in the "few store items" witness's testimony (Borckardt et al., 2003). A witness gaining credibility because of the truthiness of peripheral details can also have their confidence as a witness undermined. The confidence of a witness (another extra-legal factor that influences truthiness and falsiness) is a more important influence on jurors' verdicts than the consistency of a witness or inconsistencies involving peripheral details. Jurors seldom give guilty verdicts when faced with a non-confident prosecution witness, regardless of whether the testimony was consistent or inconsistent or contained peripheral or central details (Brewer & Burke, 2002). Finally, professional actors can be hired to read deposition testimony, rather than showing a videotape of the testimony of the actual witness. Of course, the person doing the reading is not introduced as an actor. A number of years ago I conducted a mock trial where we compared the credibility of a live actor reading deposition testimony with a videotape of that testimony. Mock jurors saw *both* clips of the actual witness's testimony on videotape (in the plaintiff's case) as well as an actor who looked somewhat like the actual witness (for the defense's case). Even with mock jurors knowing the live reader was not the real witness, and jurors having seen the actual witness on videotape, jurors treated the live reader *as if* she was a real witness, and the live reader's credibility was significantly higher than the credibility of the actual witness on videotape. Discrediting, undermining, and replacing videotaped testimony with a live reader (a professional actor) can counter truthiness and falsiness of an opposing attorney and turn them into nothingness (or sometimes even into truthiness for one's own side).

Truthiness and falsiness related to characteristics of litigants can also be countered. For example, attorneys and jury consultants frequently discuss with litigants (and their friends and family) desired demeanor, dress and self-presentation in the courtroom. I have found that using clothing one size larger than normal often makes a litigant look less threatening, more vulnerable, and more sympathetic. Research has suggested that wearing eyeglasses can help make a person look more intellectual and

less threatening, and criminal defendants who wore eyeglasses received fewer guilty verdicts (44%) than defendants who did not (56%) (Brown et al., 2008). Countering litigant characteristics can help turn falsiness into nothingness or even truthiness.

I believe that the vast majority of truthiness and falsiness can be exposed and/or countered in some way, though not always for all jurors. Voir dire can be used to identify jurors for whom exposure and countering will not work. That said, I cannot stress strongly enough that effective use of exposure and countering requires not only the exposure and countering to occur but also explicit effort be spent turning jurors' attention back to the evidence, as once the persuasive "gimmicks" are exposed or countered, what is left is the evidence.

I routinely advise clients to expose, counter and use extra-legal factors in their favor, turning the other side's truthiness into nothingness or falsiness, and one's own claims into truthiness. Even though truthiness and falsiness are small effects that can help only some of the time (e.g., ambiguous or weak evidence, for only 60% to 70% of jurors), my attitude is that "You never know. They might work this time." You may have noticed that I put my picture at the top of this article. This picture is nonprobative as to the truth of anything I have written. My hope is that by seeing my picture that I created truthiness and you more strongly believe what I wrote, even if only a little bit. This picture tactic is common with newspaper columnists and bloggers, and for the reason I just described. Did the use of my non-probative photo on this article create truthiness? I don't know. Maybe not. I am hoping my arguments and evidence are not weak or ambiguous. However, I don't believe the use of my picture created falsiness, so no reason exists for me not to try to create truthiness – except one. By exposing to you my use of this truthiness tactic, I most likely obviated any effect it might have had and potentially allowed a backfire to occur. If so, I beg your forgiveness. I thought using my picture on this article was the best way to illustrate truthiness and falsiness, and how, through exposure, you can turn "nesses" into nothingness. ☺



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