



Metaphors and the Minds of Jurors:

Practical Applications for Trial Attorneys and Consultants

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GLOVES AND DNA weren't the only arguments at the O.J. Simpson trial. The attorneys also argued over metaphors—and for good reason. Metaphors have passed from literature into litigation. Now PR professionals use them. So do politicians and generals. Lawyers use them as well, not because they sound pretty, but because they work. They use them because metaphors are the stealth bombers of persuasion.

O.J. Simpson Prosecutor Christopher Darden, during closing argument, said:

“This relationship between this man and Nicole, you know, it is like the *time bomb ticking away* [author's emphasis]. Just a matter of time, just a matter of time before something really bad happened.”

Johnny Cochran, of Mr. Simpson's defense team, challenged that metaphor, saying:

“We are going to tell you and convince you about the motive in this case, and then he [Darden, author's emphasis] spent a long time trying to do that. As I say,

he did a fine job and addressed the facts and conjured up a lot of emotion. You notice how at the end he kind of petered out of steam there, and I'm sure he got tired and he petered out because this *fuse* [author's emphasis] he kept talking about kept going out. It never blew up, never exploded. There was no triggering mechanism.”

Metaphors associate one thing or idea with another thing or idea. The “ticking” time bomb is a metaphor because it relates one concrete thing (the time bomb) with a seeming dissimilar thing (the relationship between Mr. Simpson and Nicole Simpson). But the impact of metaphors extends well beyond poetry and into fundamental cognitive processes.

How Metaphors Work Forensic Magic

Neuroscience, jury research and social science recognize their power to shape our attitudes and decisions—and our brains. First, metaphors frame our thoughts because they form cognitive structures. Mr. Darden's “ticking time bomb” metaphor was no literary flourish. It was specifically designed to frame how the jurors interpreted the evidence presented at trial. The metaphor

was designed to form facts into a cogent and coherent picture in juror's minds. This might seem like a tall order—but not when we understand how metaphors work in the brain.

A neuroscience adage is that “neurons that fire together, wire together.” D.O. Hebb's 1949 quote in [Organization of Behavior: A neuropsychological theory](#) means that neurons bundle and form cognitive coalitions surrounding associations. For example, when metaphors link two ideas or images (“fire together”), neurons bind to one another (“wire together”) and form deeper, more powerful thoughts. To the extent that Mr. Darden presented evidence to reinforce that connection, those neurons will bind to form stronger associations between the metaphor and Mr. Simpson.

Second, metaphors chart past and future decisions. Metaphors organize our history and memories into coherent narratives. Similarly, metaphors organize new information. Jurors, in our example, were presented with the prosecution's new information and new metaphor of a “time bomb.” So O.J.'s counsel, Mr. Cochran worked to disassemble that connection. He had to disassemble Darden's metaphor or let those cognitive connections strengthen. The defense could not let that happen. The cognitive map made by Darden's metaphor had to be dismantled by another metaphor. Just denying that the metaphor is inaccurate is insufficient. The remedy for one metaphor is another metaphor.

Third, metaphors transform perception. They shape both what and how we think. By using a familiar object to stand for something complex, unclear or unknown, metaphors shape the *process* of thought as well as the *product* of thought. The right metaphor shapes the way jurors assess motive, responsibility, or personality. Metaphors inform forensic decisions. For example, an early forensic metaphor was first used in a murder trial in 1907. The defense, using the relatively new kind of expert testimony from a profession then known as “alienists” (later, psychiatrists), said that the defendant suffered from a “brain storm.” This now well-known metaphor, besides causing a public uproar, caused the first trial to end in a hung jury. Although later convicted, the metaphor provided a powerful image by which jurors addressed the then-existing legal excuse for murder.

A “brain storm” didn't just introduce an excuse into the equation of criminal guilt. The “brain storm” metaphor connected brain activity to the sometimes sudden, violent, eruption of forces unknown to us—a tsunami of the mind, so to speak. While the 1907 jury knew little of psychiatry and even less of neuroscience, they certainly knew that the brain

Create a forensic metaphor.

Be alert for witnesses' use of metaphors. How do they liken one thing or idea to another? Might the metaphor be useful to characterize trial issues? Freely associate or “brainstorm” key trial issues or testimony—especially complex or abstract trial issues. What are these concepts or ideas “like”? Of what do they remind you? What images come to mind? Is there a movie or TV scene or character or literary reference applicable?

Then take cues from the culture. How understandable and how closely applicable to the key trial issues is the proposed metaphor? Is it likely to be misunderstood by a diverse jury?

controlled human thought and behavior. They also knew about “storms.” Storms could come up suddenly and behave violently. The metaphor made a clear and cogent cognitive association between how storms work and how the brain works. The defendant could not control himself any more than we can control a thunderstorm. The defense wasn't just making a new cognitive connection about the mind and storms. The defense was making connections about how thinking can be violent, unexpected and inevitable. After all, there will always be storms; they will arise suddenly and they can often be violent.

So, the defense was not only making a scientific point. The defense was making a legal point. If the defendant had no control over his “brainstorm,” how could he have the requisite *mens rea* for a murder conviction?

Fourth, metaphors work implicitly as well as explicitly. Research shows that metaphors work both consciously and unconsciously.

Jurors or judges don't need to be literary critics for metaphors to work. Metaphors are influential without jurors even knowing they just heard one!

We use metaphors in our communication so often that we hardly notice them. The Simpson jurors may not have consciously noted that attorneys Darden and Cochran were using metaphors. It didn't matter. Their brains had already heard the metaphor. The neurons were already associating or “wiring together”. The chain of influence had already commenced and “once the bell is rung...”

The only way to undermine one metaphor is to replace it with another. Mr. Cochran had to instill the image of an unfused time bomb or a time bomb with no explosive—a dud. Only metaphors overcome metaphors.

Fifth, both Darden and Cochran used their metaphors to their best advantage. The “time bomb” and the “dud” metaphors were on point and understandable to the jury. These are exactly the characteristics that researchers find are the most persuasive. This makes sense because the metaphor must be familiar if it is to be effective. The metaphor also must be on point for the jurors to pertinently apply it.

How Trial Consultants Can Help Trial Lawyers Use Metaphors Successfully

Trial consultants can help their client attorneys spot, develop or counter metaphors in several, unique ways. First, and most importantly, is to simply remind lawyers how valuable metaphors are to winning cases. More and more law schools

train their students about the importance of narratives in their legal writing and trial practice classes. Yet, the specific, cognitive impacts of metaphors and their persuasive qualities often go undervalued. Valuing metaphors heightens our awareness of their influence. Consultants can provide reminders about how metaphors capture and keep the judge's or jury's attention.

The consultant can specifically help their clients listen for the "stealthiest" of metaphors. Sometimes the briefest metaphor yields the best results. In testimony at one Virginia criminal case, the prosecution's forensic scientist likened DNA to a "blueprint" for the body in one sentence. The metaphor was quick, clear and accessible. It is both a credible metaphor and a threat to the defense. The defense consultant would want to suggest even more pertinent metaphors to immunize the jury.

To undermine the "blueprint" metaphor, the defense attorney would insert another metaphor. For example, the attorney could use the image of an imperfect blueprint. This new metaphor might be inserted in opening and closing statements and throughout the trial. Suggested words can go something like this:

DNA is not destiny. DNA doesn't determine everything. It is like the first page of a blueprint. The first page of a blueprint only shows the outside of a building, the façade. Even genetic scientists say that while genes "load the gun," culture "pulls the trigger." So DNA evidence doesn't determine a person's motive. It doesn't determine a person's opportunity to commit a crime. DNA doesn't determine a person's will. You, the trier of fact, determine what the inside of the house looks like. When you buy a house, you want to see the inside of the house. Does the plumbing work? Do the lights turn off and on? Is the building soundly constructed?

You, the triers of fact, are building inspectors, not just people looking at how good the paint job is.

DNA is only the first page of a blueprint. It's what on the inside of the house that is important. You need to go inside the building and see for yourselves what's on the inside. That's what I want to help you to do.

In forming forensic metaphors, trial consultants can listen and respond to the language used during discovery and depositions by both opposing lawyers and witnesses that reveal trial strategy, the characterization of the parties or other witnesses, or other information useful. Sometimes the consultant will suggest a strategic metaphor to characterize the lawyer's position or, conversely, consultants will need to suggest undermining metaphors.

The infamous "broccoli" metaphor became a central way for opponents to characterize provisions in the Affordable Health Care Act. During the March 27, 2012 Supreme Court oral argument in [Department of Health and Human Services v.](#)

[Florida](#)(2012), Justice Scalia raised the broccoli metaphor to challenge the Act's individual mandate to purchase health care insurance.

Justice Scalia asked Solicitor General Verrilli:

"Could you define the market — everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli."

General Verrilli: "No, that's quite different. That's quite different. The food market, while it shares that trait that everybody's in it, it is not a market in which your participation is often unpredictable and often involuntary. It is not a market in which you often don't know before you go in what you need, and it is not a market in which, if you go in and — and seek to obtain a product or service, you will get it even if you can't pay for it. It doesn't —"

Justice Scalia: "Is that a principal basis for distinguishing this from other situations?"

The metaphor stuck and the press debated it for weeks. More importantly, Justices on both sides of the 5-4 decision, upholding the Act's constitutionality, again evoked the broccoli metaphor. This metaphor was impressive because the metaphor was both apt and accessible. It is at least plausible to connect the mandated purchase of health care in the marketplace to the purchase of broccoli in the food marketplace. Additionally, everyone knows what broccoli is and everyone has an opinion on whether or not they will buy it. The proof of a forensic metaphor's power is always how much attention it commands. In this case, the attention was considerable.

What might be a contrary metaphor which the government might have used? If broccoli was meant to evoke a food that is avoided by some consumers, then what is a desirable, even necessary food? Water might be such a metaphor. So the antidote for Justice Scalia's "broccoli" metaphor is buying water. While one might choose not to buy broccoli, we all need water and will buy it.

Second, consultants can help create metaphors from scratch. Making forensic metaphors does not require either a law degree or a degree in fine arts. It does, however, require attention to specific trial issues, the social, cultural and linguistic dispositions of the jurors, witnesses and lawyers, and it takes expertise at free association. Trial consultants can help trial attorneys generate metaphors by identifying potential metaphors from discovery, deposition and pretrial research, by freely associating metaphors that frame precise trial issues or by creating metaphors that frame the case essence.

During the trial of Zacarias Moussaoui, an accused conspirator in the 9/11 terrorist attacks, defense attorney Edward

MacMahon wanted to undermine a “hero” metaphor. MacMahon had read a note by accused hijacker Mohamed Atta, who was killed in the attacks, which called the suicide attackers “heroes.” MacMahon, arguing that while Moussaoui was an al-Qaeda member, he took no part in the conspiracy. MacMahon wanted to distance his client from the “hero” metaphor and from other 9/11 defendants. He concluded his opening statement:

“Please don’t make him a hero, ladies and gentlemen. He just doesn’t deserve it.”

MacMahon, in deflating the hero metaphor, needed to position his client between two common metaphors—the “hero” and the “anti-hero.” MacMahon astutely defines a third metaphor, that of a “non-hero.” The “non-hero” metaphor is an ordinary, harmless fellow who fancies himself as much more.

An imaginative scan through such literary or cultural figures reveals at least one non-hero candidate: Walter Mitty. He was the “everyman” character in James Thurber’s 1939 short story *The Secret Life of Walter Mitty*. Walter is a “non-hero” living an extraordinary life, but who fantasizes about extraordinary and heroic adventures. The cultural metaphor has been often repeated in literature and Mitty has been played on screen both in 1947 by Danny Kaye and in 2013 by Ben Stiller. Such a metaphor applied to Moussaoui would work to change his image from an evil schemer to a hapless dreamer.

Third, consultants can alert trial lawyers to opportunities for metaphors at each major juncture of litigation. At trial opening and closings, lawyers can cogently and succinctly frame both the weaknesses of the opposition position and the strengths of their own position. Using metaphors at openings is a way to frame both the opposition’s case and to establish the conceptual framework for your own case. Employing metaphors during openings is an excellent way, literally, to create new neural pathways for considering the case. Then, reinforcing the same metaphors at closing and throughout testimony reinforces

those cognitive associations.

Metaphors are also powerful appellate tools. Appellate argument can be a staccato fire of questions from the bench and truncated answers from lawyers. Metaphors don’t need many words and can be subtly communicated. One subtle metaphor has a bite far worse than its bark. That is, lawyers who insert and repeat metaphors can insinuate metaphors without fanfare with effective results. Metaphors succinctly and cogently frame the argument in the lawyer’s favor, are memorable, and influence judges even on the implicit level.

The Bottom Line

Metaphors are powerfully persuasive tools. Metaphors make intuitive sense once brought to our attention and are proven by the social and behavioral science research. Metaphors also offer opportunities for us to incorporate neuroscience knowledge into trial practices. First, simple reminders about the power of metaphors increase awareness. Most lawyers aren’t poets, but they do want to win cases. They may be well aware of narrative or storytelling’s power with jurors, but may not apply this same value to narrative’s best friend—the metaphor.

Second, metaphors are best deployed throughout all phases of trial and appeal. Listen for the opposition’s metaphors even during depositions to gain insights into how they seek to characterize the parties and their case theory. Third, create case-specific and understandable metaphors (see sidebar). Fourth, be attentive for metaphors during trials and use metaphors to undermine opponents’ metaphors. Metaphors are not sleeping dogs that lie. They create immediate cognitive associations. The “antidote metaphor” should be administered as soon as possible. Fifth, consider using a central, master metaphor that serves as a case theme. A master metaphor is effective at capturing the essence of the case and mapping the juror’s decision making process and outcomes. Finally, as the “stealth bombers” of forensic narratives, metaphors covertly influence legal decisions by acting beneath the conscious radar of the jury. 📌

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