Developing Effective Trial Graphic Communications[1]

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When attorneys discuss graphic exhibits their comments usually track image, color, size and perspective--the language of the artist. However, graphic communication in the courtroom has very little to do with art. Nevertheless, lawyers looking for an edge are bombarded with factual missives designed to guide practitioners toward better exhibits: *e.g.*, use "IBM blue" because jurors will better remember that shade, or, color that box red to bring attention. All such advice is rooted either in experience or science and often useful. But it is about art, not trial.

Consider the opponents you have faced in court and the variety of successful communication tactics they have employed. You may have seen the spell-binding orator who uses nothing but imagination as key points are enumerated finger by finger. Other competitors have used nothing but butcher paper scrawl and still prevailed, while many employ highly sophisticated electronic images delivered by television and lost. The avant garde may turn to laser disk technology for delivery of images on the belief that ours is a television-based society so this is how jurors learn--but ask yourself after watching even one Road Runner cartoon on Saturday morning can you recall how many times Wiley Coyote was flattened? and Some attorneys shun CD-based delivery systems because they are fearful of being perceived by jurors as too "slick", preferring instead the technology of yesterday, standing in the dark with the ghoulish under-glow from an overhead projector, delivering their points as disembodied voices in a pitch black courtroom. And still they win: go figure. The variety of graphic strategies, tactics and techniques successful attorneys employ is matched only by the number of consultants available to proffer advice.

This profusion of advice and confusion over artistic styles and the best technologies for courtroom communication of graphic exhibits is further complicated by the continuing evolution of computer assisted design software. Within the span of a few short years the personal computer virtually has eliminated an entire occupational field--the Graphic Artist. Ten years ago, the principal skills in this field centered on cutting, pasting, drawing skills and other tools of the practical artist. Now such images are designed and printed in minutes. The result is a surplus of graphic artists with obsolete skills and a surfeit of new aspirants trained on the home computer. The falling price of a powerful graphics engine now has eliminated the last barriers to entry in this market. It should not be surprising, then to learn the mean starting wage in this field has dropped below $17,000 and that most major firms such as banks and utilities out-source their graphic design needs to freelancers. A increasing number of software vendors now target law firm staff for programs designed to enhance the production of colorful, pretty pictures. Finally, it is less necessary than ever even to draw basic images in such fields as medical malpractice since most basic procedures already have been rendered and are available digitally for distribution or scanning.

These developments haven't been lost on either the plaintiff or defense bar. Most attorneys understand by now the importance of visual communication and the important part it can play in the presentation of evidence and its retention in the minds of juror. Many of the lawyers' offices I've visited contain copies of the famous 1861 print of Napoleon's march to Russia by Charles Joseph

Menard, more recently popularized by Edward R. Tufte whose work has had such a dramatic impact on courtroom graphics.[2] Other authors subsequently have developed graphic perspectives that underscore the power of visual communication in the courtroom.[3]

Likewise, the importance of themes in the organization of defense case has widely been noted, particularly in relationship to the importance of storytelling in conveying defense themes to the jury. Increasingly, lawyers are urged to develop a strategy for graphic communication and use this in the context of case themes. One author urges attorneys to "Identify one potent, key visualized theme and two and two or three visualized sub-themes that support it. If you present too many themes--too many images--you risk diluting the message. If you present too much or too complex information, you will overwhelm the jurors. . .[4]. The difficulty with all these approaches is that they focus on the technical variety and quality of exhibits and ignore their origin.

The fallacy of *a priori* assumptions about what jurors need to know is that they ignore what the audience wants to know about a case. Attorneys who assume knowledge of juror's needs typically follow a deductive logic that flows from internal features of the case as they already have experienced it through deposition testimony, legal precedent, jury instructions, expert opinions, judicial rulings (*i.e.*, the *facts*) and not from the socio-cultural expectations and taken-for-granted assumptions jurors will employ in the courtroom to frame their verdicts.

Facts versus stories.

Whenever attorneys "select" a document for enlargement or identify facts for a time line they are assuming the investment of time and resources will be rewarded by better juror understanding of their case. This is not necessarily true because our jurors do not merely react to the immutable arguments two lawyers place before the jury box. Moreover, jurors do not hear isolated facts as much as they interpret what is being said through the filter of their own experiences. Facts are interpretable by jurors only in terms of their place within the metaphoric structure of court proceedings.[5] Insight to this process is provided in Devine's emphasis on the content of jurors' talk as they offer alternative scenarios of "what really happened" in interpreting the information at hand

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[2]See Edward . Tufte, *The Visual Display of Quantitative Information*, (1983) Graphics Press: Cheshire, CT; and Edward R. Tufte, *Envisioning Information* (1990) Graphics Press: Cheshire, CT.

[3]See Anders Wallgren, Britt Wallgren, Rolf Persson, Ulf Jorner and Jan-Aage Haaland, *Graphing Statistics & Data: Creating Better Charts* (1996) Newbury Park, CA: Sage Publications; William S. Cleveland, *Visualizing Data* (1993), AT&T Bell Laboratories; also R.J. Rychlak, *Real and Demonstrative Evidence: Applications and Theory*, Charlotte, VA The Michie Company, 1995; or, Gregory P. Joseph, *Modern Visual Evidence* (1996) New York: Law Journal Seminar Press. .

[4]Rodney Jew and Martin Q. Peterson, "Envisioning Persuasion: Painting the Picture for the Jury," *Trial*, October, 1995.

[5] Richardson, Laurel. (1990) "Narrative and Sociology." *Journal of Contemporary Ethnography.*

and attempting to reach a verdict.[6] Similarly, Holstein's analysis is grounded in a phenomenological perspective that draws from the emphasis of Schutz and Goffman on everyday life interpretive schemes or frameworks.[7] This perspective places emphasis on the importance of inductive thinking by jury members. Gutman suggests jurors' "subconscious images" are important because they show that interpretive frameworks are not based solely on a conscious reasoning process. Anyone who has served on a jury or heard the deliberations of a mock jury has to have been struck by the frequent introduction and acceptance of utterly extraneous and unrelated facts and comments into deliberations. The story of a case provides the structure upon which jurors hang the facts they understand along with the weight and measure of their personal experiences that they perceive to be pertinent.

In short, the truth of a verdict is not found by a jury as much as it is constructed. Every trial has its own narrative history and special reality. If we are to shape this developing narrative, we must understand and use the same building blocks of experience that jurors likely will employ. Jurors tell us what they believe are the important understandings of a trial through the logic of simulation and descriptive research. This paper provides two examples of the design process drawn respectively from the criminal courts and a recent children's product liability case.

Florida *v.* Exenia

Noel Exenia was a nineteen year old youth, married with two children and living in South Texas. His greater family allegedly was associated with the import of marihuana. The indictment alleged he was dispatched to Bradenton, FL to collect a debt owed the family by a local drug dealer. Mr. Exenia set out in is 1985 Pontiac with wife and two children staying three nights in a local Holiday Inn, visiting the dealer without success on two different occasions. He expended his cash and was forced to relocate his family to a Motel 6 on his last night in Florida. The next day he went to the dealer's home, and entered the premises. There, under video and audio surveillance by the Drug Enforcement Agency and local police he shot the dealer twice at point blank range (once in the temple), stabbed him 17 times, bending the knife in the man's spine, and finally bashing his face in with a statue of the Virgin Mary. He fled the scene holding a gun and a bag of money, with police in hot pursuit and after a 75 mile, high speed chase, was finally apprehended in Ocala, Florida. This was a tough case.

The most damning piece of evidence was the audio tape of events in the crime scene which was recorded off a telephone recording device. The video surveillance covered his movements outside the victim's home. The defendants position was this was self defense while the state called it capital murder.

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[6] Devine, Foy R. (1988). "Deliberations of a Mock Jury." *Trial,* September, 75-78.

[7] Holstein, James A. (1985). "Juror's Interpretations and Jury Decision Making", *Law and Human Behavior*, 9,1.

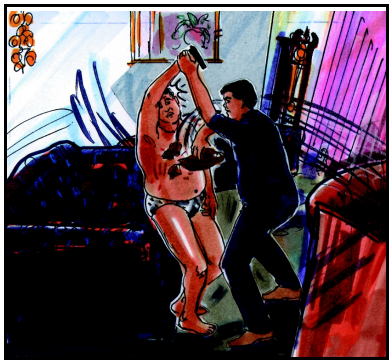
The most difficult part of telling this story involve the choreography of movement and the associated explanation of crime scene details such as blood spatter patterns. The tape recording provided the prosecution with a chilling echo of the murder--powerful demonstrative evidence. In fact, when attempting to explain it to me, counsel had the appearance of a dancing walrus.

To address this problem we employed an iterative series of focus groups in which we solicited juror feedback on the defendant's testimony so as to build a story board account of Exinia's movements and the sequence of events associated with this killing. These boards illustrate the key pieces of testimony which was offered in broken English by the defendant--as interpreted by the surrogate jurors. It is important to note these drawings account for all of the physical evidence at the scene that ostensibly favored the prosecution, *e.g.*, the extensive patterns of blood at several points around the apartment.

In the first scene, the dealer draws a weapon on Mr. Exinia to coerce him to stop the requests for money. Exinia, unarmed, had no choice but to defend himself and a wrestling match for the gun ensued.

After a brief struggle, the weapon discharged directly into the clavicle of the victim, shattering his shoulder. Mr. Exinia, shocked by the report of the weapon in a confined space, fell back four steps to the edge of the kitchen. From that point of view, he saw the victim struggling to his feet with the weapon in his left hand. Unarmed, Exinia took up a butcher knife and assaulted a

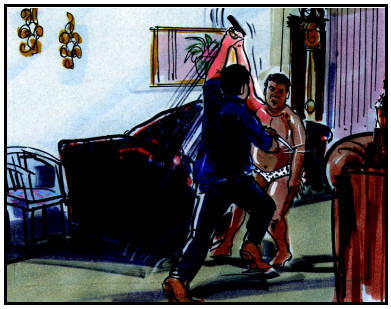
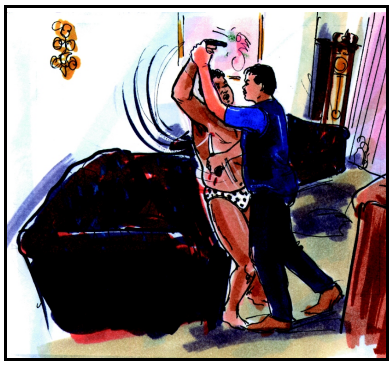
man who was by now holding a gun.

The most important point of the story from a jury perspective concerned the inanity of attacking someone holding a gun with only a knife in hand. The point was also important legally because of the duty to flee. Therefore, at this point in the story, when stopped by jurors, we switched to an aerial view so as to explicate reasons why the attack continued. Xenia's escape route was blocked an he had no alternative but to continue the fight.

When the two continued to grapple, Xenia's attention was focused on the hand of his opponent in which the weapon was being held. While he was able to stab his opponent repeatedly, the resulting wounds lacked force and constituted mainly flecking motions. The autopsy revealed no wounds penetrated the abdominal cavity. One wound to the back of the neck penetrated to the bone and resulted in bending the knife blade.

As the two men continued to wrestle for the pistol, the weapon discharged directly into the victim's temple with the bullet exiting through the ear. The medical examiner attempted to help the prosecutor here by testifying that this wound was not immediately fatal--thus establishing the special circumstances of suffering that would enhance the state's position in the penalty phase of the trial. Because the victim did not fall immediately when shot, there was a brief pause in the struggle.

During this momentary lull, Exinia reached back to the statue of the Virgin Mary that was standing on the wet bar (present in each of these panels) and struck the victim in the face and fracturing his skull.

Next, these drawings were assembled into a very crude animation in which the different panels were correlated with a recording of the audio surveillance that reflected the state's best evidence. The pictures provided an alternative meaning that otherwise would not have been evident in a defendants verbal interpretation of the state's audiotape.

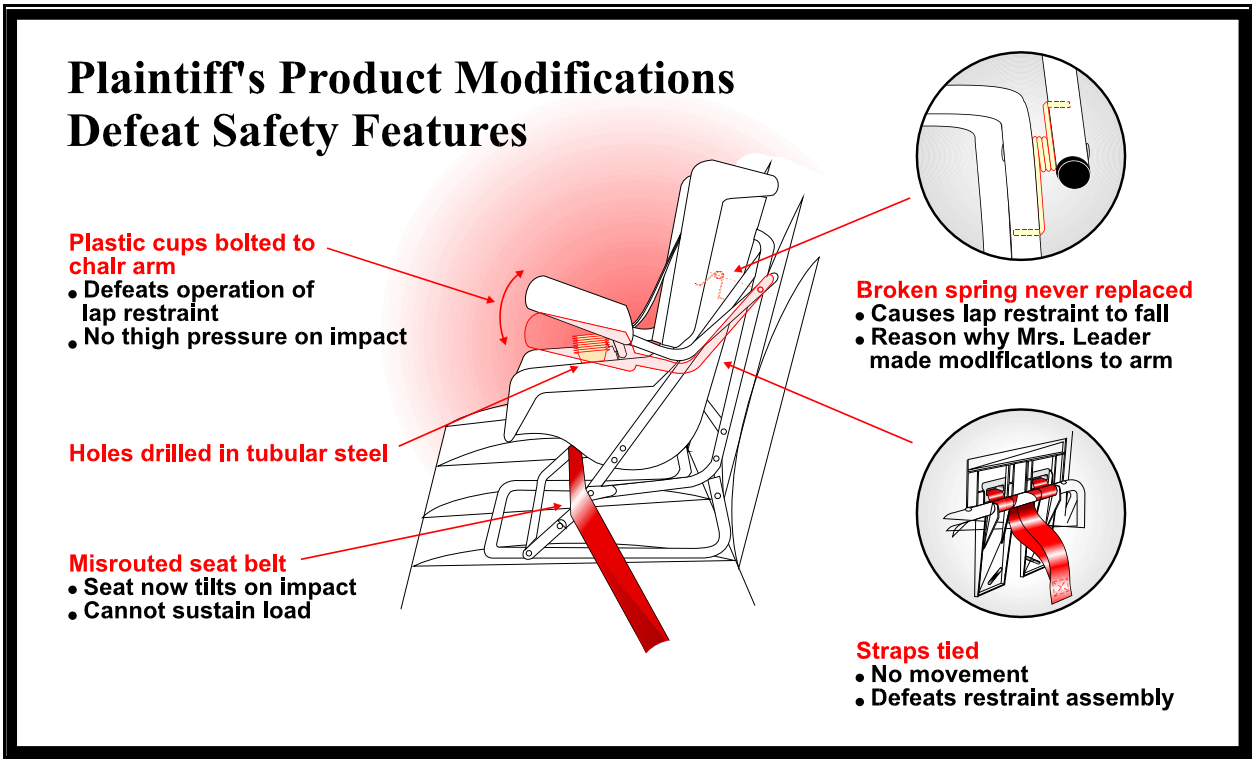
The story line of the fight was interpreted by some jurors in light of their experience with basketball. This was essentially viewed as a continuation foul--the player fouled but the basket counted--self defense. Unfortunately, Noel did not understand basketball after a lifetime of soccer and admitted under cross examination that he had, in effect, taken a free swing, as the prosecutor put it. Consequently, Mr. Exinia was convicted of assault. He was not convicted of murder nor was he found guilty of committing a crime with a firearm--the penalty for which is a minimum five year sentence in Florida.

The key to this approach was that it was derived from juror's interpretations of events as they were explained in a non-directive, focused group discussion. The drawings account for all controversial physical evidence. More important, they gave intuitively credible meaning to events as jurors understood them within the framework of their own understanding of the physical evidence available.

The Children's Product Case

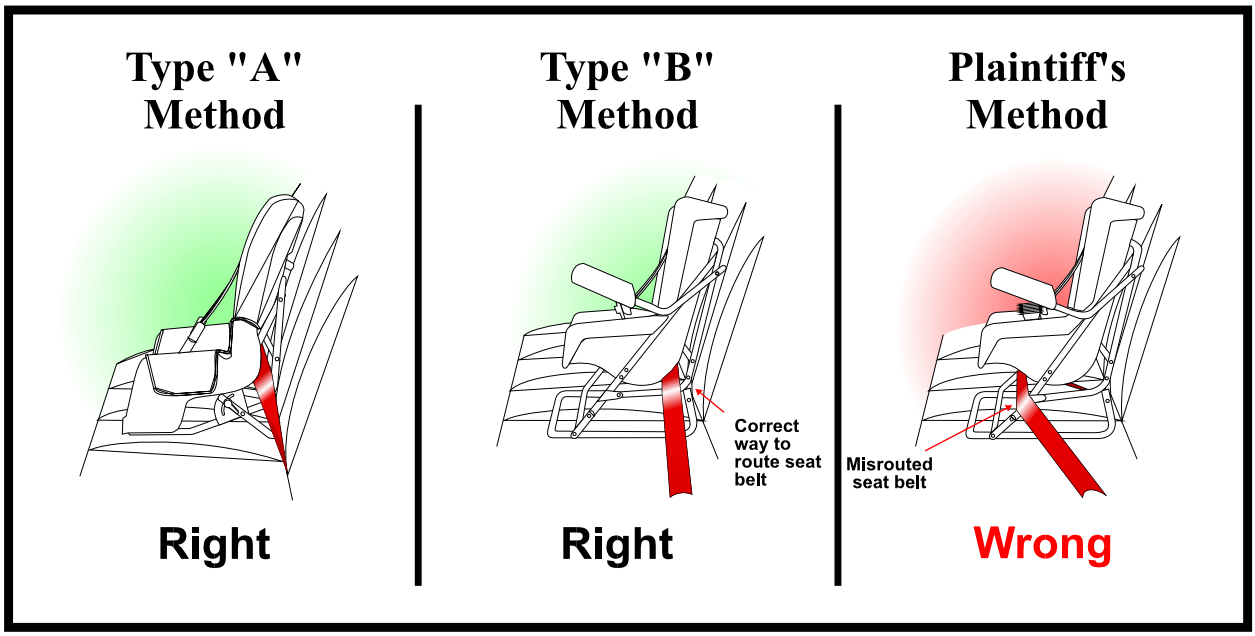
While the first example was taken from a criminal trial, the logic of the graphic design process is no different in any other type of case; *e.g.*, civil product's liability defense. Effective graphic communication must be rooted within the jury's framework of understanding. It must emerge from their interpretations of the case presentations and be based on inductive logic, not deductively derived from facts which counsel may long have pondered in the process of bringing the case to trial.

The manufacturer of a child automobile restraint was sued for the alleged failure of the device in the course of a crash on an icy, mid-western highway. He restraint had been manufactured in 1984 and purchased by the mother for $13.06 in a thrift store. The device was in disrepair and mom cleaned and bleached it, then added tape and in the process, removed the instructions for appropriate safety features. The return spring of the front guard was damaged and draped down on the infant's thighs so Mom drilled two holes in the metal arms and screwed a plastic cup onto the armrests to keep the guard from pressing down on her child. The continuous strap which formed the seatbelt on the device provided a self locking function: when inertia pushed the child forward during deceleration, the straps would pull down on the guard locking the child in the seat. By attaching the

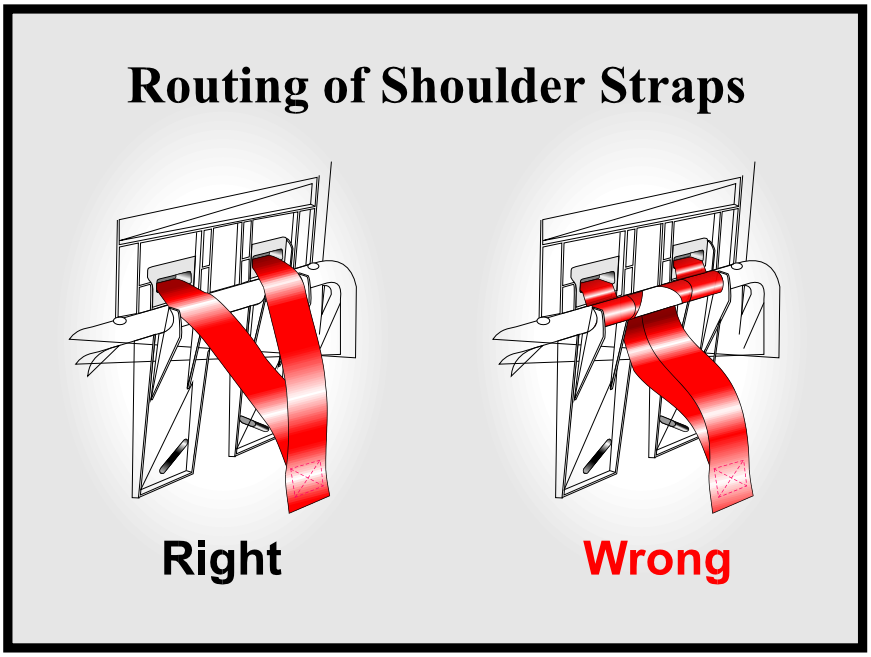


plastic cups this function was defeated. More importantly, the straps were tied at the back of the seat because of perceived play in the front guard. By tying the straps down, the parents defeated a second safety feature of the design. Finally, when the seat was installed in the car, the father inappropriately placed the car's seatbelt around the lower front of the child restraint rather than through the upper portion of the frame. Although he claimed to have installed it properly, the bending of the metal during caused during impact clearly demonstrated error. While the father might have claimed this

was a warnings issue, it was also true that a second child also was seated in the back, also in a child



restraint of similar design, but manufactured by a competitor. The father testified that he properly also had threaded this seat belt in accord with its' instructions on the second child restraint.



Focus group participants were sympathetic to the parents and moved by the catastrophic injuries suffered by the young child. They were hesitant to blame the parents for the loss, even though their gross modifications clearly vitiated the safety design. The close comparison, however, between the two nearly identical car seats (one properly threaded and the other not) permitted the attribution of blame in a relatively neutral manner. Therefore, rather than repeatedly emphasizing the parent's roles in creating a hazard in an otherwise safe restraint system, we elected to provide the

jury with clear illustration of the multiple errors that had occurred. Blaming the parents was a distasteful option for our research subjects, something they would consider only with clear explanation of the mistakes that lead to the child's subsequent suffering. The drawings presented here were validated in additional focus group sessions and apparently served that purpose, at least as far as the simulations were concerned.

Unfortunately, at trial the defense expert for the first time had an opportunity during the middle of his testimony to examine the second child restraint and discovered what could be interpreted as evidence that it too had improperly been installed by the father. This added fuel to the debate with the child's father who claimed he had properly installed both seats. Now there was evidence he had secured neither in the correct manner. The expert perceived this as a chance to increase blame attributable to the parent.

Certainly the haze of combat in trial does not provide occasion for the cold study of facts. Increasing blame attributable to the parents served to increase empathy for their plight in raising a quadriplegic. More importantly, this tactic established a more difficult comparison for the defense. The theme of "Right, Right, Wrong" exemplified in the figure above provides a neutral basis for establishing the parental mistake. Now it became clear that the competitors child restraint also had been installed improperly yet the child in that seat was uninjured. Obviously, the defendant's restraint system was inferior in some fundamental aspect. The defendants were assessed a large damage award as a consequence.

The main point of this illustration is that the graphical logic of any case must remain rooted in the social frames jurors, not parties, bring into the courtroom. It is not enough to have attractive artwork. It is not sufficient that demonstrative evidence express case themes. The most important feature of visual communication in the courtroom is that it must remain consistent with the perspectives of those critics whose judgements matter most at trial--prospective jurors.

Conclusion

Effective trial exhibits must be equally strong in concept and design. Good exhibits must reflect an understanding of jury decision-making processes in the specific case at hand. While it always is challenging to stimulate the visual imagination of jurors, we must do so in a manner that enhances their intuitive acceptance of the case.

This means both graphic artists and surrogate jurors must be constituent members of counsel's trial consulting team. Draft images at their most basic level of organization must be presented to subjects in the context of ongoing field interviews, focus groups and other simulations. Almost mystically, jurors will tell us what they need to know and how that information can be visually organized to best fit with their own world views. Graphical strategy must be established in concert with the framing of trial arguments--there is no demarcation between verbal and visual communication and no line between author and illustrator. In this regard, good graphic

communication in defense is similar to a good children's book: the words and the pictures are inseparable. If the defense is to enjoy the benefits of a substantive foundation for each exhibit, design must proceed jointly with discovery. Rather than waiting until the eve of trial to arbitrarily designate items we think the jury will need, the effective defense team will begin building exhibits and arguments simultaneously. This audience-based approach ensures graphic presentations are appropriately prioritized and integrated.

Finally, expensive exhibits are not necessarily the best exhibits. The crucial objective for trial graphics involves the early delivery of case themes and organizing principles jurors need in order to reach the desired verdict by a path of their own choosing. If targeted graphics are employed to respond to the basic frames of social interaction subjects will employ in organizing the case in their own minds, jurors will remember what they see and the verdict will follow.