

# HIDING THE ELEPHANT: HOW THE PSYCHOLOGICAL TECHNIQUES OF MAGICIANS CAN BE USED TO MANIPULATE WITNESSES AT TRIAL<sup>†</sup>

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<sup>†</sup> The title was inspired by Jim Steinmeyer's book *HIDING THE ELEPHANT: HOW MAGICIANS INVENTED THE IMPOSSIBLE AND LEARNED TO DISAPPEAR* (2003). The title refers to Harry Houdini's famous illusion performed in 1918 when he made an elephant disappear on the stage of the New York Hippodrome Theater.

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INTRODUCTION

*Law is not justice and a trial is not a scientific inquiry into truth.  
 A trial is the resolution of a dispute.*—Edison Haines

*The real secret of magic lies in the performance.*—David Copperfield

A. *Overview*

Trials, those oft long, theatrical, highly contentious happenings in court-rooms are intended to resolve disputes. Certainly, in civil matters how one defines a successful resolution is frequently biased as to the party defining the term. Regardless of how one defines it, the common denominator in any dispute is that both sides seek to win.

Edison Haines’s quote above is telling. Each party desires to have a dispute resolved, and resolved in the manner *they* desire. So *how* does one win? *Truth* may, or may not, have some role in the matter. Commonly, one or both sides employ legal representation to assist them. In addition to the traditional skills employed by lawyers, many share the skillsets utilized for hundreds of years by entertainers that we know as magicians. But unlike magicians, the courtroom is the venue for their performances.

Misdirection, misinformation, selective attention, ambiguity, verbal manipulation, body language interpretation, and physical manipulation are all basic skills practiced, honed, and employed by magicians. Many of these techniques have been equally mastered by some of the greatest trial lawyers in their constant quest to win.

B. *A Matter of Perspective*

In 1917, Harry Houdini performed a single, yet incredible, illusion: “[u]nder the bright spotlights of New York’s Theatre Hippodrome, he made a live elephant disappear.”<sup>1</sup> In 1983 David Copperfield made the Statue of Liberty disappear in front of both a live and a national television audience.<sup>2</sup> To be

<sup>1</sup> Jim Steinmeyer, *Newsletter - Summer 2003*, JIMSTEINMEYER.COM, <http://www.jimsteinmeyer.com/newsletter/archive/summer03.html> (last visited Nov. 15, 2014).

<sup>2</sup> IAN O. ANGELL & DIONYSIOS S. DEMETIS, *SCIENCE’S FIRST MISTAKE: DELUSIONS IN PURSUIT OF THEORY* 44 (2010); Curt Low, *The Magic of David Copperfield V: Vanishing*

sure, neither the elephant nor Lady Liberty *actually* disappeared. But from the perspective of the audience they did, indeed, disappear. So which is correct? Did they, or did they not?

Consider this courtroom scenario: A witness testifies that on a particular evening she observed the defendant driving a red Chevrolet Corvette on Hammond Street at approximately seven o'clock in the evening. A number of factors impact the accuracy of this testimony;<sup>3</sup> in fact, her testimony may be completely inaccurate. Assume, for a moment, that the witness is completely wrong. Also assume that the fact finder *believes* the witness to be one hundred percent correct. So, was the defendant driving a Corvette on Hammond Street or was he not? Your answer should most certainly be that he was not. But for the purposes of the trial, the defendant *was* driving the Corvette on the date and at the time and place as testified to by the witness. The *real* truth may be something completely different. But for the purposes of that trial, what the fact finder believes is the "reality" for that particular situation. What actually occurred may or may not be reflected in the testimony and may never be brought out at trial. Alternatively, the truth may be brought out but not believed by the fact finder.

So what about Houdini's elephant or Copperfield's Statue of Liberty? Logic tells us that neither the elephant nor the Statue could disappear. But from the perspective of the audience, at each of those moments, on each of those days, both the elephant and Lady Liberty vanished. Completely disappeared. Did they disappear? A trial is substantially similar in that the perspective of the audience (judge or jury) is what matters. The only real difference is that after a demonstration of an illusion, the audience "dismisses" the idea that magic happened; in a courtroom, the goal is to grasp onto facts that can be believed as real. Audiences in a magic show know they have been fooled and recognize that their being fooled is part of the entertainment. A trial is not entertainment. In a trial, the fact finders may be fooled (intentionally or unintentionally) but are not left with the idea that what has been conveyed is impossible. If the fact finders believe that a particular piece of evidence was impossible then they will dismiss that evidence as untrue.

Returning to the Corvette. The defendant may have never driven on Hammond Street in his entire life. He may testify to that fact. He may introduce evidence that supports his claim. But in the end, if the judge or jury believes that he was driving the Corvette on Hammond Street on that particular evening,

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*the Statue of Liberty (1983) (With Morgan Fairchild)*, YOUTUBE (Sept. 8, 2012), <https://www.youtube.com/watch?v=wt2JbtqF3yo>.

<sup>3</sup> Factors which may impact the testimony include: perception, memory, narration, and integrity. By way of example, the witness may have thought he saw the defendant but in fact saw someone else. The same problem could apply to the color of the vehicle. As to memory, the witness may recall seeing a Corvette but on that particular occasion saw a different car. As to narration, the witness may testify as to 7:00 p.m. but in fact the time was 5:00 p.m. Finally, the witness may simply be dishonest and intend to deceive the court.

then the truth for the purposes of that trial is that he *was* driving the car on that date and at that time.

At the end of a trial, when all of the evidence has been presented, the only thing that matters is what the fact finder(s) believe to be true. For them (judge or jury), the reality of the dispute before them lies in what they believe to be true and dismiss as untrue. It is the perspective of the fact finder that becomes the truth. And this point is where the skills of a trial lawyer and the skills of a magician dovetail.

The motivation of the trial lawyer and the magician are shared; they seek to influence, impact, and, in some cases, alter the perspectives of their respective audiences. And many of the tools and techniques used by both lawyer and magician are the same. This article examines some of those skills.

### *C. The Playbill*

Act I: The Opener provides a brief overview of the common tools used by lawyers (and magicians) and discusses how they manifest themselves in the courtroom. Act II: Misdirection examines the various forms of misdirection including verbal misdirection, the use of personal connections, word choice, and directed focus. Act III: Misinformation examines how the use of misinformation plays into responses with regard to inaccurate input, false memories, and a lack of shared meaning of vocabulary. The Intermission discusses how the Federal Rules of Evidence may impact some of these tools. Act IV: Digging Deeper delves a bit deeper into the techniques of the choice of words<sup>4</sup> with a detailed look at grammatical tools such as the choices related to verbs, modifiers, articles, adjectives, adverbs, and phrases. Act V: Possible Countermeasures suggests possible solutions that may help combat these various manipulative techniques. The Curtain Call summarizes everything.

#### ACT I: THE OPENER

*If you look up “charming” in the dictionary, you’ll see that it not only has references to strong attraction, but to spells and magic. Then again, what are liars if not great magicians?—Deb Caletti*

Lawyers use many techniques in trial, but the primary tool is the use of words. Although lawyers use demonstrative evidence, video, graphics, computer simulations, and the like, the most fundamental tool is the use of words. Courtrooms provide a number of opportunities for which lawyers may demon-

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<sup>4</sup> Although the scope of this article is limited to an examination of the impact on responses, other research has evaluated the impact of questions on juries and their perceptions. See, e.g., Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687 (1990); Saul M. Kassin et al., *Dirty Tricks of Cross Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV. 373 (1990); John C. Reinard & Darin J. Arsenault, *The Impact of Forms of Strategic and Non-Strategic Voir Dire Questions on Jury Verdicts*, 67 COMM. MONOGRAPHS 158 (2000).

strate their oratory skills. *Voir dire*, opening statements, direct and cross-examination, and closing statements all provide ample opportunity to exercise and hone their abilities to effectively use words. Additionally, trials often provide opportunities for the use of objections, responses to objections, motions, and arguments to exercise the lawyer's craft. Couple those tools with appearance, body language, and physical manipulation of their surroundings and the trial lawyer's effectiveness is enhanced. Words come in many forms but the trial lawyer's most crucial skill set is how he or she uses words in a court of law when asking questions.

It is uncanny how many techniques lawyers share with the performing arts and, in particular, with magicians. Magicians use psychological techniques such as misdirection, intentional focus, and ambiguity to manipulate their audience. Lawyers use these techniques and their psychological effect on persons to manipulate witnesses and, ultimately, the fact finder. These techniques, such as misdirection, are folded into their arguments, their examination of witnesses, and the like in an effort to impact the ultimate result. That is, to win.

#### ACT II: MISDIRECTION

*If I were a magician, I'd hand out broken compasses.  
It's all about misdirection.*—Jarod Kintz

##### A. Generally

By far, one of the most common and effective tools among magicians and lawyers alike is misdirection. In *People v. Simpson*, the defendant, O.J. Simpson, was being tried for the murder of his ex-wife, Nicole Brown Simpson, and her boyfriend, Ronald Goldman.<sup>5</sup> On January 24, 1995, opening statements began in the murder trial.<sup>6</sup> A little more than eight months later, the trial concluded with a verdict on October 3, 1995.<sup>7</sup> And yet, after months of oral testimony, numerous fact witnesses, multiple expert witnesses, and countless pieces of tangible evidence, the most famous takeaway from the case and one of the most frequently recalled quotes, was uttered by the famed attorney Johnnie Cochran.<sup>8</sup> As part of his closing statement, Mr. Cochran referred back to O.J. Simpson's attempt to try on leather gloves found at the crime scene and delivered these lines:

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<sup>5</sup> Douglas O. Linder, *The Trial of Orenthal James Simpson*, FAMOUS AM. TRIALS: THE O.J. SIMPSON TRIAL 1995 (2000), <http://law2.umkc.edu/faculty/projects/ftrials/simpson/simpsonaccount.htm>.

<sup>6</sup> *Key Dates in the O.J. Simpson Case*, CNN (Feb. 5, 1997), <http://www.cnn.com/US/9702/05/oj.timeline/>.

<sup>7</sup> *Id.*

<sup>8</sup> The Associated Press, *Johnnie Cochran, Famed Defense Lawyer, Is Dead at 67*, N.Y. TIMES (Mar. 29, 2005), <http://www.nytimes.com/2005/03/29/national/29wire-cochran.html>. Johnnie Cochran, a famous trial lawyer born in 1937, took a number of highly publicized cases including the Simpson case and passed away in 2005. *Id.*

I want you to remember these words. Like the defining moment in this trial, the day Mr. Darden asked Mr. Simpson to try on those gloves and the gloves didn't fit, remember these words; if it doesn't fit, you must acquit.<sup>9</sup>

And those words were remembered; the jury, America, virtually everyone who remembers the trial remembers those words. The jury's final decision was an acquittal of all charges.



Mr. Cochran's famous quote came as a result from the demonstration requested by the prosecutor. At the request of Mr. Darden, the court required Mr. Simpson to try on the now famous bloody gloves.<sup>11</sup> However, in an effort not to contaminate the evidence, Mr. Simpson had to put latex gloves over his hands before trying on the leather gloves.<sup>12</sup> So the scene is set. Mr. Simpson must now slide leather gloves over latex gloves. As is well known, trying to slide anything over latex is virtually impossible. Because of the friction between the gloves in evidence and the latex, that task is incredibly difficult (if not impossible) regardless of whether or not the gloves fit the hand.

The result was a glove that did not quite fit and the famous line Cochran uttered: "if it doesn't fit, you must acquit."<sup>13</sup> This brief demonstration did not prove the defendant's innocence. Rather, it was misdirection; it was theater; it was performance. And it worked.

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<sup>9</sup> *Closing Argument of Johnnie Cochran (Excerpts)*, FAMOUS AM. TRIALS: THE O.J. SIMPSON TRIAL 1995 (2000), <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/cochranclose.html> (last visited Nov. 15, 2014).

<sup>10</sup> *Was Evidence Manipulated in O.J. Simpson Trial?*, FOX NEWS (Sept. 10, 2012), <http://video.foxnews.com/v/1832719190001/was-evidence-manipulated-in-oj-simpson-trial/>.

<sup>11</sup> Colleen Curry, *10 Classic Images That Explain the O.J. Simpson Trial*, ABC NEWS (June 12, 2014), <http://abcnews.go.com/US/10-images-explain-oj-simpson-trial/story?id=24058030>.

<sup>12</sup> *Id.*

<sup>13</sup> *Closing Argument of Johnnie Cochran (Excerpts)*, *supra* note 9.

Cochran directed the jury's attention away from numerous pieces of damning evidence and focused their attention on something they could grasp onto—something tangible and seemingly real. He effectively moved their focus from evidence that is incriminating to that which raises doubt. More importantly, that particular demonstration was not reflective of whether or not the gloves fit because the gloves were not put on his bare hands. This was misdirection at its finest. Did the gloves fit? We will likely never know. But the jurors' perception *was* reality for that trial. For purposes of *People v. Simpson*, the truth was that the gloves did not fit.<sup>14</sup> The elephant had vanished.

Misdirection can appear in many forms and the judicial system is rife with examples. In a recent case out of the State of Georgia, a father was charged with murder—accused of intentionally leaving his twenty-two-month-old son in a hot car to die.<sup>15</sup> During the preliminary hearing, the prosecution asked questions which included allegations that during the day the child died, the father was trading text messages with various women.<sup>16</sup> It was further alleged that at least one of these women was under the age of eighteen.<sup>17</sup> If the defendant was, in fact, trading these text messages, the fact that he did so raises a number of serious concerns. If he did so while intentionally leaving his son to die in a hot car he arguably has some sort of psychopathy. But did those allegations have any relevance to the matter before the court?

The purpose of the hearing was to determine whether there was enough evidence for the case to go to a grand jury.<sup>18</sup> Did the allegations of sexual text messages add to the relevant evidence? Did the allegation that one of the females was under the age of eighteen add to the relevant evidence? Certainly the judge thought so. These allegations, while problematic for many reasons and highly inflammatory, had nothing to do with the purpose of the court proceeding.<sup>19</sup> This was a classic case of misdirection; raise something ugly, something offensive, and something that no one could justify, and which can easily be proved. Was this relevant to the murder charges? No. But the judge, who in this case was also the fact finder, admitted evidence that had nothing to do with what he was there to decide. The prosecutor used the techniques of a magician—misdirection. The judge was looking at the inflammatory evidence and,

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<sup>14</sup> Linder, *supra* note 5.

<sup>15</sup> David Beasley, *Georgia Man Charged with Murder of Son in Hot Car to Remain Jailed*, YAHOO NEWS (July 3, 2014, 6:21 PM), <https://news.yahoo.com/georgia-father-ac-cused-sons-death-hot-car-due-171728373.html>.

<sup>16</sup> Carol Robinson, *Justin Ross Harris Hearing Includes Underage Sexting Allegations, Witnesses Calling Him a Great Dad*, AL.COM NEWS (July 3, 2014, 5:50 PM), [http://www.al.com/news/index.ssf/2014/07/justin\\_ross\\_harris\\_hearing\\_bri.html](http://www.al.com/news/index.ssf/2014/07/justin_ross_harris_hearing_bri.html). Specifically, the allegations were that the defendant was trading text message that were sexual in nature (sexting) and one of the women was only sixteen years old. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The prosecution argued that these allegations were evidence of motive. *Id.* That connection, at best, is weak. Even if true, the inflammatory nature seriously outweighs any probative value they might have.

therefore, not necessarily looking at the evidence relevant to what he was charged with the decision to make. The prosecutor focused the judge on those terrible facts. The result? The case was referred to a grand jury.<sup>20</sup>

### *B. Making Connections*

Misdirection can manifest itself in many forms. Steinmeyer notes that part of “[t]he success of the magician lies in making a human connection to the magic.”<sup>21</sup> The lawyer shares the same challenge. The need to make a connection, at some level, in some regard, with what he or she is trying to prove is also incredibly important. Lawyers and magicians share a common tool—they make connections with people.

One technique used to make those connections is human touch. Lawyers use human touch in the courtroom for similar motives as to those who use it out of the courtroom. Human touch impacts peoples’ perceptions and connections.

A waiter or waitress may touch you on the shoulder at some point while serving you. This action is intended to make a connection for the purpose of increasing tips.<sup>22</sup> That personal touch (pun intended) helps create that connection. Why do they call you by name (when they can)? More personal connection which leads to higher tips.<sup>23</sup> Wait staff capitalize on the fact that if they can connect with you then you will tip higher, and they are correct.<sup>24</sup>

The famous magician Howard Thurston was known for making personal connections, sometimes in unique ways. As an example, when performing the rising card trick where a chosen playing card is lost in the middle of a deck (usually located in a wooden houlette located center stage) and then magically rises, he would select a “little boy in the audience [who] was urged to stand on his theatre seat and pull his father’s hair to make the cards rise.”<sup>25</sup> The connection (little boy, father, audience, magic trick) makes the illusion. It is no longer simply a card rising out of a deck. It is an effect that draws the entire audience into the moment: the boy pulling his father’s hair at precisely the same time the card was rising from the center of the deck on the stage.

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<sup>20</sup> *Id.* To be fair, the case had a number of bad facts and most likely would have been referred to a grand jury even if the evidence of the text messages and underage female were not considered. It was reported that the evidence included internet searches relating to child deaths in hot cars, how to survive in prison, and visits to a website that advocates not having children. *Id.* All of this is relevant and certainly damaging to the defendant. Why then were the text messages necessary? Because lawyers do not like to lose and they will use every tool at their disposal to obtain the outcome they seek—even misdirection.

<sup>21</sup> JIM STEINMEYER, *HIDING THE ELEPHANT: HOW MAGICIANS INVENTED THE IMPOSSIBLE AND LEARNED TO DISAPPEAR* 17 (2003).

<sup>22</sup> MICHAEL LYNN, *MEGA TIPS: SCIENTIFICALLY TESTED TECHNIQUES TO INCREASE YOUR TIPS* (2004), available at <http://www.tipping.org/tips/megatips.pdf>. Dr. Lynn is an Associate Professor at the School of Hotel Administration at Cornell University.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> STEINMEYER, *supra* note 21, at 14.

The contrast to simply performing the effect on the stage without the connection to the audience is stark. In the former example, the audience connects with the boy and his pulling of the father's hair and how in that very moment magic is made and experienced by everyone in the audience. The connection brings everyone together at the same time for the same reason to experience the same illusion. When there is no connection, the conjurer says a few magic words and up comes the card. These connections, although theatrical and having no technical impact on the magic effect, are exactly like those employed by the trial lawyer.

Lawyers make connections too, and necessary ones. Whether in front of a judge or jury, lawyers capitalize on factors they believe will help them win.

Take jury selection,<sup>26</sup> for example. A lawyer will often use the names of individual jurors during *voir dire* in an attempt to connect with the members. During the *voir dire* process, lawyers attempt to learn biases and perspectives of prospective members in an effort to strike those potential members that have biases that work against their client and seat members that have biases that work for their client.<sup>27</sup> This attempt to establish a connection can be critical. If

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<sup>26</sup> Although commonly used, the term "jury selection" is technically inaccurate as juries are not selected. Sitting juries usually result from a pool of potential jury members that are "struck" whether for cause or not. So technically one "strikes" a jury, one does not "select" a jury.

<sup>27</sup> Officially, the purpose of *voir dire* is explained a bit differently. According to the United States District Court for the Southern District of New York, *voir dire* is explained this way:

To begin a jury trial, a panel of prospective jurors is called into the courtroom. This panel will include a number of persons from whom a jury will be selected to try the case. Alternate jurors may be chosen to take the place of jurors who become ill during the trial.

The panel members are sworn to answer questions about their qualifications to sit as jurors in the case. This questioning process is called the *voir dire*. This is an examination conducted by the judge and sometimes includes participation by counsel. A deliberately untruthful answer to any fair question could result in serious punishment to the person making it.

The *voir dire* examination opens with a short statement about the case. The purpose is to inform the jurors of what the case is about and to identify the parties and their lawyers.

Questions are then asked to find out whether any individuals on the panel have any personal interest in the case or know of any reason why they cannot render an impartial verdict. The court also wants to know whether any member of the panel is related to or personally acquainted with the parties, their lawyers, or the witnesses who will appear during trial. Other questions will determine whether any panel members have a prejudice or a feeling that might influence them in rendering a verdict. Any juror having knowledge of the case should explain this to the judge.

Parties on either side may ask that a member of the panel be excused or exempted from service on a particular jury. These requests, or demands, are called challenges.

A person may be challenged for cause if the examination shows he or she might be prejudiced. The judge will excuse an individual from the panel if the cause raised in the challenge is sufficient. There is no limit to the number of challenges for cause which either party may make.

The parties also have a right to a certain number of challenges for which no cause is necessary. These are called peremptory challenges. Each side usually has a predetermined number of peremptory challenges. The peremptory challenge is a legal right long recognized by law as a means of giving both sides some choice in the make-up of a jury. Jurors should clearly understand that being eliminated from the jury panel by a peremptory challenge is no reflection upon their ability or integrity.

In some courts the peremptory challenges are made openly in the hearing of the jury. In others, they are made from the jury list out of the jury's sight.

*Handbook for Trial Jurors: The Voir Dire Examination*, U.S. DISTRICT CT.: S. DISTRICT

a jury member connects with the lawyer, the lawyer will try to use that to the benefit of his client. This tool can be quite effective in, for example, a criminal trial.

Suppose lawyer Jones is representing criminal defendant Smith for assault. Jones attempts to make a connection with members of the jury during *voir dire*. Then, during the course of the trial, Jones creates a physical connection with Smith during the trial at various times. For example, when questioning a witness that discusses Smith's character, Jones may walk behind Smith and put his hands on Smith's shoulders. When conferencing with Smith, Jones may put his arm around Smith bringing him in close to Jones. Why? The desire is to make the jurors transfer their "connection" with Jones to Smith. It is an effort to humanize Smith. *Surely, if Smith were such a bad guy Jones wouldn't be so friendly toward him.* Notice that the concept of evidence is completely lacking from this discussion? These connections are, in a sense, another form of misdirection. Does it work?

Consider the discussion of a waiter's tips above. While we don't have specific studies on the use of human touch during courtroom trials, there is evidence that supports the proposition that human touch makes a difference. Dr. Michael Lynn posits that:

Touching is a powerful form of interpersonal behavior that can communicate affection, appreciation, aggression, dominance, social support, or other meanings depending on the context in which it occurs. In commercial settings, casually touching customers has been shown to increase the time they spend shopping in a store, the amounts that they purchase, and the favorability of their store evaluations. These positive effects suggest that being touched may also increase the tips that customers leave their servers.

[Two researchers] tested this possibility at two restaurants in Oxford, Mississippi. Three waitresses . . . randomly assigned their customers to one of three touch conditions. Customers either were not touched, were casually touched on the shoulder once for about one and a half seconds, or were casually touched on the palm of the hand twice for about half a second each time. All touches occurred as the waitresses returned change to their customers at the end of the meal. Eye contact was avoided during this process.

The effects of the touch manipulation were significant. Customers left an average tip of 12% when they were not touched as compared to 14% when they were touched once on the shoulder and 17% when they were touched twice on the palm of the hand. Subsequent research conducted by various other researchers has demonstrated that: (1) casually touching customers increases the tips of both male and female servers, (2) touching increases tips more when waitresses touch the female members of mixed-sex dining parties than when they touch the male members of those dining parties, and (3) touching increases the tips of young customers more than those of older customers.<sup>28</sup>

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N.Y., [http://www.nysd.uscourts.gov/jury\\_handbook.php?id=6](http://www.nysd.uscourts.gov/jury_handbook.php?id=6) (last visited Nov. 15, 2014) (emphases omitted).

<sup>28</sup> LYNN, *supra* note 22.

It appears that in some contexts human touch can make a difference. Does that translate to positive results in the courtroom? Without a study we will likely not know with certainty, but what we do know is that lawyers use the technique.

In *People v. Simpson*,<sup>29</sup> there were numerous examples of O.J.'s lawyers touching him. In the trial of *State v. Zimmerman*,<sup>30</sup> there were numerous instances of the defendant's lawyers touching him. In *State v. Anthony*,<sup>31</sup> there were many instances where Anthony's lawyer put his hand on Anthony's shoulder or moved well within her personal space. Although these particular examples are of well publicized cases, they simply highlight the practice of successful trial lawyers. All three cases resulted in acquittals.<sup>32</sup>

So how does the creation of a personal connection equate to misdirection? The answer lies in the answer to another question. What do personal connections have to do with admissible evidence? Generally, nothing. Whether a person is likeable, whether a person connects in some way with another, has nothing to do with whether or not the facts support or oppose what is attempting to be proved in a court of law. Even though a juror may "connect" with a defendant, such connection does not mean the defendant is not lying on the witness stand. So why do lawyers seek to make personal connections? Misdirection. The jury member may be more likely to believe the defendant if there is a connection between the two.

Although connections are one factor that impacts a judge or jury, the primary form of communication, and the primary tool of the trial lawyer, is the use of the spoken language.

### C. *The Impact of the Words on the Listener*

Words chosen by the speaker can have a significant impact on the listener. Both magicians and lawyers impact the listener through the use of the spoken word. Attorneys impact the listener primarily through questions. As noted trial consultant Kelly Kellermann pointed out, "[q]uestions do more than ask: they solicit and convey information, and focus and suggest answers. By influencing answers, questions alter what is understood by others."<sup>33</sup>

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<sup>29</sup> *People v. Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995).

<sup>30</sup> *State v. Zimmerman*, No. 12.CF.1083.A (Fla. Cir. Ct. 2013).

<sup>31</sup> *State v. Anthony*, No. 48-2008.CF.015606-O (Fla. Cir. Ct. 2011).

<sup>32</sup> This is not to imply, in any way, that touching a defendant on the shoulder or other forms of personal contact will result in an acquittal. This is also not to imply that the personal contact was the reason for the acquittal in these cases. However, it does demonstrate that this technique is used by lawyers and may contribute to the success of the trial. Personal connection, such as touch, is merely one of the many tools used by lawyers.

<sup>33</sup> KATHY KELLERMANN, *PERSUASIVE QUESTION-ASKING: HOW QUESTION WORDING INFLUENCES ANSWERS 1* (2007), available at <http://www.kkcomcon.com/doc/KPQA.pdf>. Kellermann is a trial consultant.

Lawyers are wordsmiths. It is not just the words they use but also the *way* in which they use them. Consider Jim Steinmeyer's explanation of the skills of a magician:

[T]here are few secrets that [magicians] possess that are beyond the capacity of a high-school science class, little technology more complex than a rubber band, a square of mirrored glass, or a length of thread. . . .

The real art is how the rubber band is handled with the finesse of a jewel cutter, how a mirror is used or concealed precisely, how a masterful performer can hint at impossibilities that are consummated with only a piece of thread. . . .  
. . . The audience is taken by the hand and led to deceive themselves.<sup>34</sup>

Lawyers often have extensive vocabularies. However, it is not the possession of the words that makes the lawyer effective; rather, like the magician, it is how the lawyer wields the words.

The fundamental premise in verbal misdirection is that the accuracy of answers will be impacted by the question posed. If an answer to a question is influenced, in part, on the words, structure, intonation, dialect, or speed used to form the question, then the one posing the question can manipulate the answer. The most basic means to influence an answer is the use of words in crafting the questions.

Words used to formulate a question may impact answers to questions in four ways. First, the wording of a question “put[s] different words in answerers’ mouths.”<sup>35</sup> Second, that “[q]uestions frame acceptable answers, suggesting some and excluding others.”<sup>36</sup> These questions many manifest themselves in leading questions or direct questions. Third, “[q]uestions carry assumptions that influence answers.”<sup>37</sup> And finally, “[a] question’s form influences answers by inviting agreement or disagreement, openness or evasion, and threat or comfort.”<sup>38</sup>

Each of these four influences can merge with leading questions. Leading questions, by definition, suggest the answer.<sup>39</sup> Therefore, the first method expressed by Ms. Kellerman is fundamentally a restatement of the definition of a leading question (putting words in the answerer’s mouth). The second method might not seem reflective of a leading question (using the question to frame the answer). Certainly, depending upon the choices given, it might not be. A question such as “Did it occur during the day or in the evening?” is not a leading question, yet would fit within Ms. Kellerman’s second paradigm. Alternatively, a question such as “Was the car blue or green?” is extremely suggestive as it

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<sup>34</sup> STEINMEYER, *supra* note 21, at 16–17.

<sup>35</sup> KELLERMANN, *supra* note 33, at 3.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 3.

<sup>39</sup> Black’s Law Dictionary defines a “leading question” as “[a] question that suggests the answer to the person being interrogated; esp., a question that may be answered by a mere ‘yes’ or ‘no.’” BLACK’S LAW DICTIONARY 1023 (10th ed. 2014).

eliminates all of the other colors as choices. Although the respondent has a choice of two colors, she is not provided with any other color choices such as yellow, or red, or white, et cetera. In that regard, framing the question by limiting the choices is, in a sense, leading. The third method is often built into leading questions (a question that carries with it assumptions). For example, "Did you hit your wife after you screamed at her?" builds in the premise that the responding party screamed at his wife. It is a simple example but many questions build in a premise in an effort to create a fact that is not, or cannot easily, be disputed. And lastly, at least with regard to cross-examination, virtually all questions meet the final criteria (inviting agreement or disagreement, openness or evasion, and threat or comfort). In fact, the best questions leave the responding party with only a "yes" or a "no" as acceptable responses. At times, questions may inadvertently mislead the person answering the question which, in turn, may mislead the fact finder.

#### D. *Poor Listeners*

Many factors may cause a responding party to be misled. One is that listeners are often poor or passive listeners. Oftentimes a listener may be confused by, or simply may not be paying close enough attention to, a question and/or the subsequent answer. "In one study, mock jurors listened to an excerpt of testimony and indicated whether certain statements were true or false. After hearing the statement, 'I ran up to the burglar alarm,' for example, most subjects recalled that the witness had said, 'I rang the burglar alarm.'"<sup>40</sup> The author of the study surmises that people may "process information between the lines and assume they heard what was only implied."<sup>41</sup>

Generally people are often passive listeners and, as a result, do not accurately hear questions. The problem of inaccurate or poor listening can certainly be enhanced or exacerbated by the stress of the setting of the courtroom, the length of the trial or hearing, the stakes of the controversy involved, the emotional tax on the listener, et cetera.

#### E. *Framed to Evoke Emotion*

Ms. Kellerman's final paradigm suggests that questions may influence answers by "inviting agreement or disagreement, openness or evasion, and threat or comfort."<sup>42</sup> In some examples, the way in which word choice is used to frame questions can readily be seen to have a significant impact on answers. As an example, during the Vietnam War, two members of Congress conducted a poll with regard to President Johnson's order in the late sixties to bomb Hanoi

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<sup>40</sup> Kassir, *supra* note 4, at 693.

<sup>41</sup> *Id.*

<sup>42</sup> KELLERMANN, *supra* note 33, at 3.

and Haiphong.<sup>43</sup> One question used the following language: “Do you approve of the recent decision to extend bombing raids in North Vietnam aimed at the strategic supply depots around Hanoi and Haiphong?”<sup>44</sup> The alternate question was crafted as follows: “Do you believe the U.S. should bomb Hanoi and Haiphong?”<sup>45</sup> In the former question, the responder could—even if incorrect—surmise the basis for the bombing thereby giving the responder more information to make a determination. In the latter question, less information is given to the responder. This may lead to the response being based on a number of factors but, of significance, gives the responder no basis from which to surmise the reason for the bombing. When the language included the terms “strategic supply depots,” 65 percent of the Americans responding favored the decision.<sup>46</sup> But with the alternative wording, when the basis of the decision was omitted, only 14 percent favored the decision.<sup>47</sup> Both questions sought identical information and yet there was a 51 percent difference in the favorable responses. The difference is statistically significant.

Under Kellerman’s different categories, the Vietnam questions likely fall under her fourth paradigm. That is, the first iteration of the question possibly invited comfort or a reason for agreement. The second question is less so.

Lawyers often create scenarios utilizing select facts to craft questions intended to target an answer. One could argue the question that simply asks for agreement or disagreement gives the responding party little information that, without more, makes him or her simply rely on existing knowledge which may be incomplete. The average responding party may not have any idea why President Johnson ordered the bombing. So, without more, the idea of bombing a city may sound terrible, or extreme to those responding, evoking emotions such as that of senseless death and destruction. But when additional information is added to the question, that additional information permits the responder to make a more informed choice. Remember that the information provided with the question may not be the entire story. That is, there may be countervailing facts that were intentionally left out. They may be left out in an effort to influence the responses.

During the period of time from March 14 through March 15, 2003, Gallup conducted a poll that asked the following: “Would you favor or oppose invading Iraq with U.S. ground troops in an attempt to remove Saddam Hussein from power?”<sup>48</sup> At that time, 64 percent of the respondents responded in the affirma-

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<sup>43</sup> *U.S. Planes Bomb North Vietnam*, HISTORY.COM, <http://www.history.com/this-day-in-history/us-planes-bomb-north-vietnam> (last visited Nov. 13, 2014).

<sup>44</sup> Sydney A. Beckman, *Witness Response Manipulation Through Strategic “Non-Leading” Questions (or The Art of Getting the Desired Answer by Asking the Right Question)*, 43 Sw. U. L. Rev. 1, 3 (2013).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Iraq*, GALLUP, <http://www.gallup.com/poll/1633/iraq.aspx> (last visited Nov. 13, 2014). The Gallup poll actually rotated three variances of the question.

tive.<sup>49</sup> Recall, at that time, the United States believed that there were weapons of mass destruction being created in Iraq.<sup>50</sup> It was later determined that Iraq did not have the arsenal that it was initially thought to have.<sup>51</sup> Although Gallup never administered a poll directly on point, it did administer a number of polls asking respondents whether or not it was a good idea to send troops to Iraq.<sup>52</sup> Of the eighty-four administrations of the poll from March 2003 to June 2014, not one of the polls reflected a positive outcome as high as the first administration before troops were deployed.<sup>53</sup> Although a great deal of information plays into individual responses, particularly with a topic as highly charged as the Iraq invasion, the information framed in the question can significantly impact the responses.

Approximately forty years ago, two researchers at the University of Washington conducted a study about words and their impact on responses.<sup>54</sup> The study sought to determine whether the use of different verbs posed in questions about the speed of a vehicle would elicit different answers that were statistically significant.<sup>55</sup> Applying this theory to trial lawyers, when asking questions by altering the simplest of words, the results may help influence a witness's response.<sup>56</sup> The fact that the way questions are formed will impact the answers to those questions is clear.<sup>57</sup>

In 1975, Kenneth Edelin was tried on a charge of manslaughter.<sup>58</sup> In a study based on that case, terms were examined which were associated with the

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<sup>49</sup> *Id.*

<sup>50</sup> *Full Text: Bush's Speech: A Transcript of George Bush's War Ultimatum Speech From the Cross Hall in the White House*, GUARDIAN (Mar. 17, 2003, 9:22 PM), <http://www.theguardian.com/world/2003/mar/18/usa.iraq>.

<sup>51</sup> *Weapons of Mass Destruction: Iraq Survey Group Final Report*, GLOBALSECURITY.ORG, [http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report/isg-final-report\\_vol1\\_rsi-06.htm](http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report/isg-final-report_vol1_rsi-06.htm) (last visited Nov. 13, 2014).

<sup>52</sup> *Iraq*, *supra* note 48.

<sup>53</sup> *Id.*

<sup>54</sup> Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING VERBAL BEHAV. 585 (1974).

<sup>55</sup> The abstract of the article summarizes the purpose of the study more fully:

Two experiments are reported in which subjects viewed films of automobile accidents and then answered questions about events occurring in the films. The question, "About how fast were the cars going when they smashed into each other?" elicited higher estimates of speed than questions which used the verbs *collided*, *bumped*, *contacted*, or *hit* in place of *smashed*. On a re-test one week later, those subjects who received the verb *smashed* were more likely to say "yes" to the question, "Did you see any broken glass?", even though broken glass was not present in the film. These results are consistent with the view that the questions asked subsequent to an event can cause a reconstruction in one's memory of that event.

*Id.* at 585.

<sup>56</sup> *Id.* at 586. The study specifically addressed subsequent questions over a time-differential in an effort to address whether memory would fill in gaps. This too would have implications at trial but exceeds the scope of this article.

<sup>57</sup> KELLERMANN, *supra* note 33.

<sup>58</sup> *Commonwealth v. Edelin*, 359 N.E.2d 4 (Mass. 1976).

victim, a twenty-four-week-old fetus.<sup>59</sup> One concern surrounded the terminology used at trial to reference a fetus. The prosecution wanted to personalize the victim while the defense sought the opposite. As noted by the author, “the charge of manslaughter, or any type of killing, quite naturally takes for granted that the victim was once alive.”<sup>60</sup> One might think that the use of particular labels might make little difference in the outcome. However, the defense counsel was so concerned with the use of language that he filed a motion “for an order to prevent use of the words ‘suffocate,’ ‘smother,’ ‘murder,’ ‘baby boy,’ and ‘human being.’”<sup>61</sup> The prosecution offered to use the term ‘male child’ instead of ‘baby boy,’ both of which were objected to by the defense counsel.<sup>62</sup> Do these terms matter? That is, does the use of a particular term over another term impact how a jury deliberates?

As discussed above, this author often posits that, in a court of law, the truth is what the judge or the jury believes regardless of whether their conclusion is based on what factually occurred. Words and the way words describe, characterize, chronicle, depict, detail, explain, and inform are impacted by the words chosen. The words chosen are impacted by the rules and procedures of the judicial system. As noted by Danet, the words “‘baby’ and ‘fetus’ are referentially more or less equivalent ways of talking about [the victim] but socially, they are miles apart.”<sup>63</sup>

As noted by Danet, questioning in the adversary system, with its rules and procedures, results in a “reality” that is “constructed and negotiated in the courtroom.”<sup>64</sup> And, she notes, the “outcome of questioning is as much a function of the verbal strategies and choices of the participants as it is of the supposed ‘facts’ of the case.”<sup>65</sup> Kassin points out that questions may mislead a jury (or fact finder) when “suggestive questions . . . produce support for . . . conjecture by shaping the witness’s testimony.”<sup>66</sup>

This conclusion bears out in a number of real world examples. One such example comes from the General Social Survey (“GSS”).<sup>67</sup> Over an eighteen-year period, the GSS asked the following questions:

Question 1: Are we spending too much, too little, or about the right amount on *welfare*?

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<sup>59</sup> Brenda Danet, *‘Baby’ or ‘Fetus’?: Language and the Construction of Reality in a Manslaughter Trial*, 32 *SEMIOTICA* 187 (1980). In this article, the scientific method was not employed but rather transcripts of proceedings were merely evaluated and conclusions drawn from the analysis.

<sup>60</sup> *Id.* at 187.

<sup>61</sup> *Id.* at 188.

<sup>62</sup> *Id.* at 189.

<sup>63</sup> *Id.* at 191.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 192.

<sup>66</sup> Kassin, *supra* note 4, at 697.

<sup>67</sup> KELLERMANN, *supra* note 33, at 5.

Question 2: Are we spending too much, too little, or about the right amount on assistance to the poor?<sup>68</sup>

Table 1 shows how the same individuals responded to the questions in significantly different ways.

TABLE 1: DIFFERENTIAL RESPONSES TO PHRASING OF QUESTIONS POSED IN THE GSS

Response Choice	Question 1: “welfare” (pct. of responses)	Question 2: “assistance to the poor” (pct. of responses)	Difference
Too Little	20%	64%	+ 44%
About Right	33%	25%	- 8%
Too Much	47%	11%	- 36%

Although the questions asked essentially the same thing, when the question was worded using the term *welfare*, forty-four percent fewer respondents felt that too little was being spent than when the same respondents were asked about money being spent on the poor. The other responses reflect similar results; that is, the use of the phrase “assistance to the poor” which often invokes sympathy had substantially different results than used of the phrase “welfare” which typically does not. Dr. Reichardt rhetorically pondered whether “politicians tend to use the word ‘assistance’ when they want to increase funding to the poor but [use] the word ‘welfare’ when they want to cut back on funding to the poor.”<sup>69</sup>

In *People v. Simpson*, the defendant, O.J. Simpson, was being tried for the murder of his ex-wife, Nicole Brown Simpson. In that case, much like the *Edelin* case, the opposing sides used significantly different words to describe identical events. For example, the defense “called *domestic incidents* that which the prosecution called *wife beating* and *abuse*.”<sup>70</sup> Clearly, the former label is intended to sterilize the incidents while the latter is designed to evoke negative emotion towards the defendant. Strategically crafting questions, particularly with words that evoke emotion, which in turn manipulates answers, could significantly impact trial results.

#### F. Directed Focus

Magicians and lawyers alike often provide the spectator specific instructions. It might be “cut this deck of cards in approximately equal halves,” or possibly, “think back to the night of the accident.” For magicians, oftentimes the instructions are designed to focus one’s attention on something so that something else will not be seen. For lawyers, the instructions frequently gener-

<sup>68</sup> *Id.*

<sup>69</sup> Charles S. Reichardt, *Wording of Questions* (2004) (unpublished manuscript) (quoted in Beckman, *supra* note 44, at 6).

<sup>70</sup> KELLERMANN, *supra* note 33, at 5.

ate a context for the answer. The result of these instructions is that a witness often has their focus directed by the lawyer. The impact may result in a skewed answer.

For psychologists, this is similar to a phenomenon known as “inattentional blindness” or “selective attention.” Inattentional blindness has been defined as an event in which an individual fails to recognize an unexpected stimulus that is in plain sight.<sup>71</sup> Although the concept of inattentional blindness refers to visual perception, the result is that the direction or instruction provided to the participant results in the blindness of the individual.

Inattentional blindness may be illustrated by a famous experiment known as the “invisible gorilla.”<sup>72</sup> The experiment consisted of a video showing young people passing a basketball back and forth.<sup>73</sup> Half of the participants were wearing white shirts and the other half of the participants were wearing black shirts. The directions which preceded the video instructed the viewer as follows: “Count how many times the players wearing white pass the basketball.”<sup>74</sup> While concentrating on the task of counting the passes, “most observers failed to notice a person wearing a gorilla suit walk across the scene (the gorilla even stops briefly at the centre of the scene and beats its chest!).”<sup>75</sup> The researchers noted that it was not necessary to distract the observers in an effort to keep them from seeing the gorilla.<sup>76</sup> The instruction to count the passes focused the attention of the observers on a specific task and, therefore, on those visual cues to assist them—e.g., the white shirts. The black shirts were ignored, as was the gorilla (also black), and this was coupled with the fact that one player was completely in black (shirt and pants). In focusing on the assigned task the observers visually blocked out anything that did not fit the criteria. As a result, the observers failed to see the gorilla. The use of “eye-tracking recordings” revealed “that many observers did not notice the gorilla even when they were looking directly at it.”<sup>77</sup> That is an extremely powerful tool—and focus—within the human mind.

Although research into the phenomenon of intentional blindness has been designed to study the cognitive cause and effect, it is easy to see how the use of specific instructions directs the focus of the observer.<sup>78</sup> This can also manifest itself in the courtroom setting.

Directing the focus of a witness may impact a trial:

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<sup>71</sup> Irvin Rock et al., *Perception Without Attention: Results of a New Method*, 24 *COGNITIVE PSYCHOL.* 502, 502 (1992).

<sup>72</sup> Christopher Chabris & Daniel Simons, *Gorilla Experiment*, *INVISIBLE GORILLA* (2010), [http://www.theinvisiblegorilla.com/gorilla\\_experiment.html](http://www.theinvisiblegorilla.com/gorilla_experiment.html).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Stephen L. Macknik et al., *Attention and Awareness in Stage Magic: Turning Tricks into Research*, 9 *NATURE REVS.: NEUROSCIENCE* 871, 873 (2008).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Beckman, *supra* note 44, at 25.

At times the brain can “fill[] in gaps—making assumptions . . . and mistaking them for facts.” Witnesses are frequently asked to review video recordings, audio recordings, computer generated reenactments, and the like. At trial an attorney, much like [the magician] Teller describes “a good conjuror . . . could potentially exploit the human compulsion to find patterns, and to impose them when they aren’t really there.” Specific instructions may lead to inattentive blindness thereby impacting the responses of witnesses. So too, when focusing the attention of the fact finder, be she judge or juror, inattentive blindness may impact their perception of the event in question. In this regard, trial advocacy may be much like Teller defines magic: “[t]he theatrical linking of a cause with an effect that has no basis in physical reality, but that—in our hearts—ought to.”<sup>79</sup>

### ACT III: MISINFORMATION

*No matter how big the lie, repeat it often enough and the masses will regard it as the truth.*—John F. Kennedy

As used by magicians, misinformation often means deception. As used by attorneys, misinformation usually does not mean intentional deception. Rather, misinformation is often used to create doubt and, on occasion, may be the result of unintentional deception. Testimony elicited from a witness is usually intended to obtain either an opinion or the recollection of an event or events. Frequently, the recollections are partially, substantially, or completely wrong. In addition to the reasons already discussed, additional factors may result in incorrect recollections that include inaccurate information, false memories, and a lack of shared meaning.

#### A. *Inaccurate Input*

In the context of a courtroom, inaccurate information means that a recollection was influenced, in part, on having been provided inaccurate information (inaccurate input). A study from 1975<sup>80</sup> examining this concept sought to determine whether the suggestion of false information would influence recollections of an event. The first experiment used questions about a short film that

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<sup>79</sup> *Id.* (alterations in original) (footnotes omitted) (quoting George Johnson, *The Science of Magic*, N.Y. TIMES, Aug. 21, 2007, at F1).

<sup>80</sup> Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOL. 560 (1975). The abstract provides that:

A total of 490 subjects, in four experiments, saw films of complex, fast-moving events, such as automobile accidents or classroom disruptions. The purpose of these experiments was to investigate how the wording of questions asked immediately after an event may influence responses to questions asked considerably later. It is shown that when the initial question contains either true presuppositions (e.g., it postulates the existence of an object that did exist in the scene) or false presuppositions (e.g., postulates the existence of an object that did not exist), the likelihood is increased that subjects will later report having seen the presupposed object. The results suggest that questions asked immediately after an event can introduce new—not necessarily correct—information, which is then added to the memorial representation of the event, thereby causing its reconstruction or alteration.

*Id.* at 560.

included objects that did not exist. Subjects were asked one of two possible questions:

Question 1: How fast was Car A going when it ran the stop sign?

Question 2: How fast was Car A going when it turned right?<sup>81</sup>

The point of the question was to determine the estimated speed of the car. The phantom object was the stop sign referenced in the question. The first question presumes the existence of a stop sign; the second question makes no reference to any such object. Half of the subjects received the first variant of the question and the other half the second variant. In a subsequent question, one hundred percent of the participants were asked “Did you see a stop sign for Car A?”<sup>82</sup> Fifty-three percent of the participants receiving the question that contained a reference to the stop sign answered “yes” to the question of whether or not there was a stop sign while only 35 percent of the participants receiving the question that did not reference the stop sign answered “yes.”<sup>83</sup> The difference of 18 percent is statistically significant.<sup>84</sup>

It was concluded that “[t]he wording of a presupposition into a question about an event, asked immediately after that event has taken place, can influence the answer to a subsequent question concerning the presupposition itself, asked a very short time later, in the direction of conforming with the supplied information.”<sup>85</sup> In that particular experiment the existence of the stop sign was, in fact, true.

Loftus offers two theories to explain the result:

The first is that when a subject answers the initial stop sign question, he somehow reviews, or strengthens, or in some sense makes more available certain memory representations corresponding to the stop sign. Later, when asked, “Did you see a stop sign . . . ?”, he responds on the basis of the strengthened memorial representation.<sup>86</sup>

Loftus’ second theory she refers to as “construction hypothesis.”<sup>87</sup> When answering the initial question with the presupposition of a stop sign, Loftus hypothesizes that the subject

“visualize[s]” or “reconstruct[s]” in his mind that portion of the incident needed to answer the question, and so, if he accepts the presupposition, he introduces a stop sign into his visualization whether or not it was in memory. When interrogated later about the existence of the stop sign, he responds on the basis of his

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<sup>81</sup> *Id.* at 564.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Significant at  $p < .05$ . “Statistically significant” means that the result is unlikely to have occurred by pure chance. In this case, according to Loftus, there is a less than 5 percent chance that the result was by pure chance. *Id.*

<sup>85</sup> *Id.* Although it may not impact Loftus’ conclusion, it is important to note that Experiment 1 was conducted as a ten-item paper questionnaire as opposed to oral interrogation. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

earlier supplementation of the actual incident. In other words, the subject may “see” the stop sign that he has himself constructed. This would not tend to happen when the initial question refers only to the right turn.<sup>88</sup>

In describing the significance of this hypothesis, Loftus notes that: “If a piece of true information supplied to the subject after the accident augments his memory, then, in a similar way, it should be possible to introduce into memory something that was not in fact in the scene, by supplying a piece of false information.”<sup>89</sup> Loftus did not attempt to replicate this particular experiment without a stop sign present. However, a year before, Loftus and Palmer conducted a different experiment in which false information was interjected into the questions.

In that prior experiment, subjects were shown a film of a car accident.<sup>90</sup> Subjects were then asked questions on two separate occasions by means of a written questionnaire.<sup>91</sup> The first set of questions was administered immediately after viewing the film while the second set was administered approximately one week later.<sup>92</sup>

The first set of questions asked the subjects about their observation of the speed of a vehicle involved in a collision.<sup>93</sup> This set of questions used either the verb *smashed* or the verb *hit* with respect to the collision between the vehicles. A week later, the second set of questions was administered. They were not permitted to view the film a second time. Subjects were asked, “Did you see any broken glass?” and were required to check a box indicating either “yes” or “no.”<sup>94</sup>

There was no broken glass represented in the film. The hypothesis was that “since broken glass is commensurate with accidents occurring at high speed . . . the subjects who had been asked the *smashed* question might more often say ‘yes’” to the test question.<sup>95</sup>

The experiment yielded statistically significant results. With regard to the question of speed of the vehicles, subjects questioned using the verb *smashed* estimated vehicular speeds greater than those subjects in which the verb *hit* was used.<sup>96</sup> With regard to the second set of questions, subjects who were questioned with the verb *smashed* were significantly more likely to answer *yes* to the question “Did you see any broken glass?”<sup>97</sup>

The tests resulted, in effect, in the creation of false memories—the belief that something existed or occurred when it did not, in fact, exist or occur.

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Loftus & Palmer, *supra* note 54, at 587.

<sup>91</sup> *Id.* The film lasted less than one minute and the accident lasted four seconds. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

*B. False Memories*

To understand the concept of false memories, one must look at the research on how memory works. It has been suggested that “memory is a veridical<sup>98</sup> record of our past.”<sup>99</sup> There are numerous theories, studies, writings, information, and misinformation about memories and recall. The only certainty is that there is much uncertainty. Nevertheless, there are some facts that are substantially supported by research. One is that we forget.<sup>100</sup> Another is that our memory process is somewhat cyclical. That is, “[w]e go without thinking about something for a while, then we remember it again, then go without thinking about it, then remember it yet again.”<sup>101</sup> There are times when you may remember more, or less about an event.<sup>102</sup> The widely held belief that certain memories are highly susceptible to repression is not as accurate as it once was thought to be.<sup>103</sup>

Studies are difficult, if not impossible, to conduct regarding certain allegations of repressed memories.<sup>104</sup> There are, however, anecdotal cases that illustrate with some clarity how certain memories, however real they might seem and however strongly they are believed to be accurate by the person recalling

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<sup>98</sup> In this case the authors intend *veridical* to mean “corresponding to facts; not illusory; real; actual; genuine.” *Veridical*, DICTIONARY.COM, <http://dictionary.reference.com/browse/veridical> (last visited Nov. 17, 2014).

<sup>99</sup> Elizabeth F. Loftus et al., *Repressed and Recovered Memory*, in *BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM* 177, 178 (Eugene Borgida & Susan T. Fiske eds., 2008).

<sup>100</sup> According to Loftus et al.:

There are simple explanations for everyday forgetting. One hypothesis is that unrehearsed information tends to decay more than rehearsed information. Another hypothesis is that some experiences are encoded inadequately to begin with, or some other experience interferes with the memory consolidation process. Despite these perfectly good (and well-documented) explanations for ordinary forgetting, there is still a widespread belief that forgetting means something sinister. Take, for just one example, a national memory survey in the US with over 1,500 respondents. People of all ages and educational backgrounds often said that when people have “spotty” memories, it is usually a sign that something traumatic has happened to them.

*Id.* at 180.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 181. However, Loftus et al. note:

It is extremely difficult to study the mechanism of repression in the controlled conditions of the laboratory. The net result of this difficulty is that much of the popular speculation regarding repressed and recovered memory has emerged in the course of clinical practice rather than as a result of empirical research. That is, the “reality” of repressed and recovered memory has been based primarily on clinical intuition rather than on data. For obvious reasons, empirical research on this issue has been practically and ethically difficult to conduct. In order to find genuine evidence that these phenomenon exist we would have to meet two criteria. First, we would have to obtain verifiable evidence that the target event took place; second, we would have to obtain verifiable evidence that the memory of the event had been inaccessible for some period of time and then that it was subsequently recovered by a process beyond ordinary forgetting and remembering.

*Id.*

<sup>104</sup> *See id.*

the event or events, appear to be completely false. Consider the case of psychiatrist David Corwin.

In 1997 psychiatrist David Corwin and a colleague published a case history that was viewed by many as proof of a recovered memory. Corwin interviewed Jane Doe . . . when she was five years old . . . . Jane's . . . parents were in the middle of a bitter custody dispute. [The Mother was accused] of sexually and physically abusing Jane . . . . Corwin met with . . . Jane . . . [and] Jane told Corwin specific details of abuse at the hands of her mother: She "rubs her finger up my vagina" in the bathtub, and did so "more than twenty times . . . probably ninety-nine times." Jane also told Corwin that her mother had burned her feet (Corwin concludes Jane was burned on a kitchen stove coil). Jane's mother lost both custody and visitation rights.

Eleven years later, when Corwin spoke to Jane . . . , the grownup Jane asked to see [the taped interviews]. Although she remembered what she had told Corwin many years earlier, Jane said she was not sure whether what she said was really true. Corwin met with her, and videotaped their session. When he asked Jane if she remembered anything about possible sexual abuse, she said: "No. I mean, I remember that was part of the accusation, but I don't remember anything—wait a minute, yeah, I do." Almost immediately, Jane described an abusive episode in the bathtub, one that . . . was different from what she had reported [eleven] years earlier. Nonetheless, the case of Jane Doe came to be seen as compelling evidence of a repressed and recovered memory.

But [two researchers] were more sceptical. When they dug into the facts of the case, they discovered that there was never any objective corroborating evidence of Jane's alleged abuse, nor was there any evidence that she had repressed the allegations. There was, however, a nasty custody battle that Jane's stepmother said they won because of the "sexual angle." And the burned feet? Well, not only did Jane's mother not have a stove with coils, but Jane had a hereditary fungal condition that could have caused what looked like a healing burn wound. Furthermore, there was also no evidence that Jane had ever forgotten the allegations of abuse. In fact, both her foster mother and her stepmother reported that Jane talked about these events frequently. At the end of this ordeal what we are left with is a videotape of a young woman's emotional reaction to herself as a child reporting an experience with detail, sincerity, and emotion. Yet none of these factors are related to the accuracy of the original allegations and provide no empirical support for the phenomenon of repressed and recovered memory.<sup>105</sup>

Though the seriousness of the allegations is not to be taken lightly, if the events in question did not, in fact, occur, the consequences are serious. A mother who was deprived of a meaningful relationship with her daughter and the untold consequences to the daughter's mental state with memories that may be less than accurate are only a tip of the iceberg.<sup>106</sup>

False memories are particularly relevant to the trial lawyer. As mentioned above, much of what lawyers do is posing questions that seek the recall of in-

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<sup>105</sup> *Id.* at 182–83 (citations omitted).

<sup>106</sup> A thorough discussion of the consequences relating to false allegations exceeds the scope of this article.

formation. If that recall is inaccurate, the results may have a profound impact on the parties.

False memories are not limited to traumatic events. Many people can describe former events with particular accuracy only to find out, at a later time, that the memory contained false information. Another way to examine this phenomenon is to take a look at how supposedly repressed memories are subsequently recovered. When recovered memories are found to be false, then all memories recovered in the same manner become suspect.<sup>107</sup> One study confirmed this concern.

In the mid-1990s, two researchers sought to prove whether or not “it was [] possible for subjects to create a coherent and detailed memory for something they never did.”<sup>108</sup>

They recruited people in pairs . . . belong[ing] to the same family. One family member became a confederate, whose job it was to tell the experimenters about some real events that the other family member—who became the subject—had experienced during childhood. . . . The confederate helped the experimenters create a description of the false event, supplying them with idiosyncratic details about which shopping mall, who was at the mall, and so on. . . . [T]he main features of the false event were always the same: The subject became lost, and was eventually found by an elderly lady who helped reunite the family.<sup>109</sup>

“By the end of the study, approximately one quarter of the subjects had created a partial or full false memory of being lost in the mall as a child.”<sup>110</sup> Many subjects did not believe the memory was false even after being told the purpose of the study.<sup>111</sup>

This, as well as many other studies, support the hypothesis that completely false memories could be implanted into a person’s memory with the person fully believing the memory to be real.<sup>112</sup> How does this translate into the courtroom? Substantial research supports the hypothesis that simple techniques can effectively implant false memories.<sup>113</sup> As a result, it becomes harder and harder to gain the actual truth at a contested proceeding.

### C. *Lack of Shared Meaning*

Another factor that may lead to misinformation is a lack of a shared meaning. Shared meaning is the idea that a word, phrase or concept may share multiple meanings. Those meanings may vary from person to person. As a result, when you use one of those words with a person, that individual might think you mean one thing when you, in fact, mean something entirely different. What

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<sup>107</sup> Loftus et al., *supra* note 99, at 184.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 185.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 186.

some might consider a simple word, phrase, or concept may have significantly disparate meanings from one person to another or one culture to another.

For example, consider the phrase “smoking cigarettes.” People have interpreted “*smoking cigarettes*” as anything from (a) taking even a single puff to (b) cigarettes they have finished, and from (c) cigarettes they have borrowed to (d) only those they have bought. Fully 10 [percent] of answers changed from *yes* to *no*, or *no* to *yes*, when given a standard definition of what counts as smoking a cigarette.”<sup>114</sup>

Kellerman has noted how individual words may hold different meanings to different people. “You” could mean “just me or also my family;”<sup>115</sup> “weekday” might, or might not, include Saturday.<sup>116</sup> Evaluative words, such as “not quite” and “slightly” have also shown to be problematic in that they mean different things to different people.<sup>117</sup> Noting that certain words, such as “lots, almost all, virtually all, nearly all, a majority of, not very many, almost none, hardly any, a couple, [and] a few” generally are interpreted similarly among individuals, other words such as “most, numerous, large proportion of, significant number of, considerable number of, [and] several” have shown to have highly variable meanings.<sup>118</sup>

Lawyers using words with variable meanings to different people can significantly impact trial testimony. Take, for example, the question “Do you drink?” Suppose a witness answers no. To him, the question might have meant on a regular (another troubling word) basis. But to the lawyer, the question more precisely might have been “Do you ever drink?” Given the witness’s answer, the lawyer may offer evidence of an occasion when the witness had a glass of wine with dinner. Was the witness being untruthful? Can the lawyer paint him that way? As a result, is the witness’s integrity now in question?

#### D. Safeguards

Although there is the potential for a trial to be rife with misinformation, there are mechanisms in place that attempt to provide safeguards for the judicial system which seek to help gain the actual truth. At the trial court level, the starting point of these safeguards is found in the Rules of Evidence.<sup>119</sup>

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<sup>114</sup> KELLERMANN, *supra* note 33, at 4.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> This article focuses specifically on the Federal Rules of Evidence and, particularly, on Federal Rule of Evidence 611 with regard to leading questions. Supplement Table S1, at <http://scholars.law.unlv.edu/nlj/vol15/iss2/11/>, provides a chart for each state and territory that reflects—to the extent it exists—an equivalent rule for that respective state and territory.

## INTERMISSION: THE FEDERAL RULES OF EVIDENCE

*Know the rules well, so you can break them effectively.*—Dalai Lama XIV

Generally, questions articulated by a lawyer on the same side of the case as the witness are not supposed to suggest the answer (a leading question). Conversely, questions posed by a lawyer on the opposite side of the case as the witness may suggest the answer. Although some questions are easily identified as leading or not (for example, “The light was red when you ran through the intersection, was it not?”), others are more challenging.

Federal Rule of Evidence (“FRE”) 611<sup>120</sup> governs questions that suggest answers in terms of “leading questions.” The Rule provides, in relevant part, that “[l]eading questions should not be used on direct examination except as necessary to develop the witness’s testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.”<sup>121</sup>

Is the following a leading question? “How tall was the bank robber?” It is likely that most trial lawyers and judges would tell you that it is not a leading question but is, rather, a neutral question. It may, in fact, be more than meets the eye. But how is a leading question defined and, more to the point, is a question such as “How tall was the bank robber?” a leading question?

Neither the Federal Rules of Evidence nor state rules define a leading question. Black’s Law Dictionary defines a leading question as “[a] question that suggests the answer to the person being interrogated.”<sup>122</sup> Few would argue that a question that asks “How tall was the bank robber?” suggests, in any way, the answer. If we reframe the question in this way: “Would you say the bank robber was about six feet tall?” then we have, clearly, suggested an answer thereby creating a leading question; one that is potentially governed by FRE 611. What about this variant? “Would you say the bank robber was taller than six feet?” Here the witness is given parameters, but parameters that may be rejected. She could easily say “no.” What if the variant were a little more unusual? “How short was the bank robber?” This question might seem to be virtually identical to the original question, merely substituting the adjective *short* for the adjective *tall*.

A choice of adjectives in the above examples does not—in either case—suggest the answer. That is to say, using the adjective *tall* does not, unlike specific references to height, provide guidance to the responding party as to what height the interrogator is seeking. Nor, presumably, does the adjective *short*

<sup>120</sup> All states except New York have enacted a rule that is similar, and in some cases identical, to Federal Rule 611(c). See Supplement Table S1, at <http://scholars.law.unlv.edu/nlj/vol15/iss2/11/>, for a complete list of rules for each state that are similar to Federal Rule of Evidence 611(c).

<sup>121</sup> FED. R. EVID. 611(c).

<sup>122</sup> BLACK’S LAW DICTIONARY, *supra* note 39.

provide such guidance. Therefore, by the strictest definition, the questions would not, in the truest sense, be objectionable based on an FRE 611 leading objection.

Federal Rule of Evidence 611 is the primary rule on point with respect to the permissibility of leading questions. Other rules, however, provide tools to assist the court in dealing with potential misleading and prohibitive questions. Federal Rule of Evidence 403 specifically permits the court to exclude “relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>123</sup> Of note is the portion of the rule that permits the court to exclude evidence that may mislead the jury. That is, any evidence, which, in the opinion of the judge, might mislead the jury, may be excluded. This permits the judge to help filter evidence that may have been elicited through creative questioning using the techniques referenced in this article. The balancing test, however, is that to exclude such evidence the court must find that the “probative value is *substantially outweighed* by a danger”<sup>124</sup> of one of the factors delineated in the rule.

Finally,<sup>125</sup> because witnesses are often questioned about a writing, a recording, or a deposition, there are times that one party may believe that the side posing the questions may be taking a statement out of context unfairly. In order to alleviate this concern, Federal Rule of Evidence 106 permits a court to admit any other part of such writing or recorded statement if “in fairness [it] ought to be considered at the same time.”<sup>126</sup>

Although the rules are tools—used by judges and lawyers alike to assist the fact finder in reaching a result—they are in many cases subordinate to an effective lawyer who can use non-rule related tools to impact his or her case. One such tool is the connection lawyers make with the fact finder.

#### ACT IV: DIGGING DEEPER

*The conjurer demonstrates that things are not always what they seem.  
Therein lies his philosophy.*—Joseph Stoddart (a.k.a. Colonel Stodare)

Steinmeyer suggests that “[w]hen magicians are good at their jobs, it is because they anticipate the way an audience thinks.”<sup>127</sup> Certainly, the same can be true of trial lawyers who anticipate the way the fact finder thinks. Expounding further, magicians “are able to suggest a series of clues that guide the audience

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<sup>123</sup> FED. R. EVID. 403.

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> Other rules may impact various concepts of fairness, truthfulness, et cetera, such as the veracity of a witness and character evidence. However, a thorough discussion of those rules exceeds the scope of this article.

<sup>126</sup> FED. R. EVID. 106.

<sup>127</sup> STEINMEYER, *supra* note 21, at 117.

... [T]hey depend on the audience's bringing something to the table—preconceptions or assumptions that can be naturally exploited.”<sup>128</sup> Lawyers rely on the same thing. However, instead of using magical props, lawyers use words. Seemingly innocent questions, such as one inquiring about a person's height, may not be so innocent after all. The way in which “a question is phrased has profound effects on the accuracy . . . of . . . testimony.”<sup>129</sup> This article has already discussed how words can, and will, in different contexts impact answers that may be given to carefully crafted questions. In this section, greater depth is explored on how words may impact responses with regard to the use of verbs, adjectives, adverbs, definite and indefinite articles, and phrases.

#### A. *Verb Choice*

In 1974, a study was conducted to investigate whether “the phrasing of the question used to elicit the speed judgment” would impact the answer.”<sup>130</sup> The subjects who participated in the study were shown films that depicted a traffic accident.<sup>131</sup> Subsequently, the subjects had to respond to written questions, one of which inquired “about the speed of the vehicles” in the film.<sup>132</sup> Subjects were divided into groups and each group was prompted with a question using a different verb to describe the collision. The verbs tested were as follows: smashed, collided, bumped, hit, and contacted.<sup>133</sup> The control word, or neutral word, appeared to be “hit.”<sup>134</sup> Seven different films were shown to different groups in an effort to replicate results with different input.<sup>135</sup> The results may seem surprising. Words that implicated higher speeds resulted in higher estimates.

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<sup>128</sup> *Id.*

<sup>129</sup> Jack P. Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOL. 90, 94 (1977). This particular study had the narrow focus of eyewitness testimony as opposed to the broader view of merely recollection. In this particular study:

Various aspects of eyewitness testimony were investigated in a simulated courtroom setting. Eighty subjects were shown a filmed murder and then testified about their observations in one of several experimental conditions. Testimony was rated for accuracy and quantity. Significant main effects were found for . . . immediacy of testimony (immediately or after a [one]-week delay), testimony structure (unstructured free recall or response to questions), question type (open-ended, leading, and multiple choice), and question bias (positive, negative, and neutral).

*Id.* at 90.

<sup>130</sup> Loftus & Palmer, *supra* note 54.

<sup>131</sup> *Id.* at 586.

<sup>132</sup> *Id.* Presumably the use of written, as opposed to oral, questions eliminates variables such as voice inflection, tone, and speed, which arguably could influence an answer. By eliminating such variables, the researcher may focus on and appropriately analyze the issue being examined.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> *Id.*

The control verb of “hit” resulted in an estimated speed of thirty-four miles per hour.<sup>137</sup> The verb “smashed” resulted in an average speed that was 19 percent higher at 40.5 miles per hour.<sup>138</sup> Table 2 reflects the results of the study.

Loftus and Palmer concluded that “[t]he results of this experiment indicate that the form of a question (in this case, changes in a single word) can markedly and systematically affect a witness’s answer to that question.”<sup>139</sup> The researchers noted that the actual speed of the vehicles played little part in the subjects’ estimation of speed but the “phrasing of the question controlled considerable variance.”<sup>140</sup>

A subsequent experiment was performed, which evaluated, in part, how time and question phrasing impacted recall. Part of that investigation offered a slight variation of the above experiment. In this subsequent test, subjects were asked about speed with either the use of the word “hit” or “smashed.”<sup>141</sup> Again, a statistically significant difference was found between the responses based on the wording of the question.<sup>142</sup>

#### B. Adjectives and Adverbs

In an unpublished study, Loftus interviewed forty people about their headaches.<sup>143</sup> Loftus found a statistical significance in the difference between answers based on the questions posed. For example, individuals reported more headaches when asked about the number of frequent headaches versus the number of occasional headaches.<sup>144</sup>

These results have been replicated in varying contexts. In the study conducted by Southeastern Louisiana University, the adjectives used in the phrasing of a question were examined.<sup>145</sup> The participants were asked to estimate the

TABLE 2: AVERAGE ESTIMATES OF VEHICLE SPEED, BASED ON PROMPTING VERB<sup>136</sup>

Verb	Speed (MPH)
Contacted	31.8
Hit	34.0
Bumped	38.1
Collided	39.3
Smashed	40.5

<sup>136</sup> *Id.* at 586 tbl.1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 586.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 587.

<sup>142</sup> *Id.* Loftus and Palmer offer an opinion as to why the different words result in different responses. Those opinions, while interesting, exceed the scope of this article.

<sup>143</sup> Loftus, *supra* note 80, at 561. It should be noted that the details of the study were not reported and this author makes no representation as to whether a group of forty subjects is enough for reliability. Nevertheless, the study does provide useful data for the dialogue presented in this article.

<sup>144</sup> *Id.*

<sup>145</sup> See generally Thomas J. Lipscomb et al., *Bias in Eyewitness Accounts: The Effects of Question Format, Delay Interval, and Stimulus Presentation*, 119 J. PSYCHOL. 207 (1985). In

speed of the cars involved in a collision.<sup>146</sup> Half of the participants were interrogated using the adverb “fast,” as in “How fast was the car traveling?” versus the adverb “slow,” as in “How slow was the car traveling?”<sup>147</sup> The hypothesis being that the use of the adverb “slow” would impact the value of the response by being suggestive in nature: i.e., the car must have been traveling at a slower speed than that which might have been otherwise perceived.<sup>148</sup> Table 3 reflects a few of the findings from the study.

TABLE 3: AVERAGE STUDY RESPONSES, BASED ON PROMPTING MODIFIERS<sup>149</sup>

Question	Modifier	Average Response
How ___ was Car 1 going? (mph)	Fast	36.20
	Slow	27.50
How ___ was Car 2 going? (mph)	Fast	39.76
	Slow	35.25
How ___ damage was done to Car 1?	Much	6.27 <sup>150</sup>
	Little	5.40
How ___ were the skid marks made by Car 1?	Long	5.04 <sup>151</sup>
	Short	3.88
How ___ noise occurred as a result of the accident?	Much	7.44 <sup>152</sup>
	Little	6.52

The results support the hypothesis:

Estimations of the speed of both cars were significantly greater when the unmarked adverb *fast* was employed as compared to the marked adverb *slow*. Similarly, estimates of the extent of damage, skidding, noise, and harm to occupants were all significantly greater when the relevant questions were phrased with unmarked . . . adverbs.<sup>153</sup>

this study, 180 students (ninety males and ninety females) were recruited from introductory psychology classes. *Id.* at 209. The subjects viewed “three representations of an automobile accident.” *Id.* The sequence showed a collision between two vehicles at an intersection. *Id.* Subsequently, a close-up view of both vehicles was shown. *Id.* With regard to the portion of the experiment that tested changes in phrasing, words were substituted with marked or unmarked descriptors: fast versus slow. *Id.*

<sup>146</sup> *Id.* at 209.

<sup>147</sup> *Id.*

<sup>148</sup> *See id.* at 208–09.

<sup>149</sup> *Id.* at 210 tbl.1.

<sup>150</sup> “Values could range from 1 to 11” on a likert scale. *Id.* at 210 tbl.1 n.c.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 209–10 (internal cross-references omitted). For an explanation of “marked” and “unmarked” modifiers, see *infra* text accompanying notes 158–160.

In a recent study of over one thousand people<sup>154</sup> that examined the wording of a question, Jay Olson found that “the exact wording of the question seemed to influence” the decisions made by the responders.<sup>155</sup> Simply changing a single word in the directive, “*name* a card” versus “*visualize* a card,” impacted the responses.<sup>156</sup>

A different approach was taken in a study that examined the use of what the researcher called “marked” and “unmarked” adjectives and adverbs.<sup>157</sup> An “unmarked” word was one that had “a nominal or neutral use that refers to the whole dimension.”<sup>158</sup> These were compared with the marked words, which had a lower bound of zero.<sup>159</sup> For example, the names of dimensions such as “high” versus “low” were used in questions such as “How high is the building?” (which would have an answer that is potentially unlimited) versus “How low is the building?” (which would have an answer that is limited to zero).<sup>160</sup> In this study, subjects were asked to make numerical guesses to questions that contained either marked or unmarked words.<sup>161</sup> The hypothesis being tested was that the use of these marked modifiers would impact responses to a statistically significant factor in the direction of the marking, while use of unmarked modifiers would not.<sup>162</sup>

Using the example of the height of the building, in the context of the hypothesis, the question “How high was the building?” should yield answers uninfluenced by the question, while the question “How low was the building?” would “presuppose that the building is low.”<sup>163</sup> In this study, subjects were told that “the experiment was a study in the accuracy of guessing measurements and

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<sup>154</sup> Jay Olson, *Revealing the Psychology of Playing Card Magic*, SCI. AM. (July 31, 2012), <http://www.scientificamerican.com/article/revealing-psychology-playing-card-magic/>. In this study, Jay Olson and two other researchers conducted an experiment and

applied well-known techniques from vision science to measure how well people see, remember, like, and choose each of the [fifty-two] cards in a standard [American] deck. . . . To measure choice, . . . asked over a thousand people to either name or visualize a card, then recorded their selections.

*Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (“When asked to *name* a card, over half of the people chose one of four cards: the Ace of Spades (25%), or the Queen (14%), Ace (6%), or King (6%) of Hearts. . . . But when asked to *visualize* a card, people seemed to choose the Ace of Hearts more often. In [the] sample, they chose it almost twice as often when asked to visualize (11%) rather than name (6%) a card.”).

<sup>157</sup> Richard J. Harris, *Answering Questions Containing Marked and Unmarked Adjectives and Adverbs*, 97 J. EXPERIMENTAL PSYCHOL. 399, 399 (1973).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* Although not addressed in the study, arguably even use of the question “How high is the building?” is not as neutral as “What is the height of the building?” Nevertheless, Harris presumed that use of the word “low” presents an, although unmentioned, upward boundary.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

that they should make as intelligent a numerical guess as possible to each question.”<sup>164</sup>

Look at the question, “How tall was the man running through the alley?” Might an answer be manipulated by phrasing the question “How short was the man running through the alley?”

Table 4 reflects a select few of the test questions used by Harris, the marked and unmarked modifiers, and the average estimates by the subjects.

TABLE 4: AVERAGE STUDY RESPONSES, BASED ON PROMPTING MODIFIERS<sup>165</sup>

Question (Units of Measure)	Modifier <sup>166</sup>	Average Response
How ___ time did the man have between planes? (min., hr.)	Much	73.2 min
	Little	37.5 min
How ___ money was in the man’s wallet? (\$, ¢)	Much	\$4.90
	Little	\$3.96
How ___ was the set of weights? (lb.)	Heavy	146.3 lb.
	Light	56.3 lb.
How ___ was the quarterback? (lb.)	Heavy	185 lb.
	Light	180 lb.
How ___ was the office building? (stories)	High	26.2 stories
	Low	13.1 stories
How ___ was the plane flying? (ft. off ground)	High	8,907 ft.
	Low	4,481 ft.

The results support the hypothesis that “answers to unmarked-modifier questions cover a wider range than answers to marked-modifier questions.”<sup>167</sup> The table reflects, in some cases, enormous variances in responses.<sup>168</sup> For example, a difference of ninety pounds in response to the questions of “How

<sup>164</sup> *Id.* at 401. The methodology of the experiment was that the examiner:

[R]ead a list of [thirty-two] questions and [the subject] wrote a numerical answer for each. The [examiner] read each question once, told [the subjects] the unit(s) of measure to be used in their answers, and then repeated the question. Each group of [subjects] received the same [thirty-two] question frames in a different random order. Items were counterbalanced such that each [subject] heard every question frame and adjective or adverb once and only once, with half of the [subjects] hearing the unmarked member in a given question frame and half hearing the marked member.

*Id.*

<sup>165</sup> *Id.* at 400 tbl.1.

<sup>166</sup> *Id.* The top word is the unmarked word while the bottom word is the marked word.

<sup>167</sup> *Id.* at 401. Harris notes:

Prior to figuring the statistics, the numerically largest score in each of the [sixty-four] distributions was eliminated, since there were several distributions with one very extreme, though not logically impossible, score, whose inclusion in the sample made the variance meaningless. In addition, three other single scores in three different distributions were eliminated for unintelligibility or [the subject’s] obvious misunderstanding of the question.

*Id.*

<sup>168</sup> *See id.* at 400–01.

heavy were the weights?" versus "How light were the weights?"<sup>169</sup> The results clearly indicate that "the wording of a question may affect the answer."<sup>170</sup>

Loftus notes that in the context of both "past personal experiences and recently-witnessed events" that the wording of questions may impact answers.<sup>171</sup> Even seemingly minor changes in wording may influence an answer. An interrogator need not be as overt as using language such as "tall" or "short," "high" or "low." In fact, the use of definite or indefinite articles may impact an answer.<sup>172</sup>

### C. *Definite and Indefinite Articles*

Use of the word "a" does not necessarily presume the existence of an object.<sup>173</sup> For example, the question "Did you see a broken headlight?" does not presume the existence of a broken headlight.<sup>174</sup> However, use of the definite article does: "Did you see *the* broken headlight?"<sup>175</sup> In the former, the inquiry is whether one existed or not. This assumes the responder would see it if, in fact, it existed. In the latter, the inquiry is wholly different. In that case, the assumption is that the headlight existed and the inquiry is whether or not the responder saw the headlight.

The significance in the inquiry is whether or not the use of the definite article as opposed to the indefinite article would alter a response. The results of a study in which this hypothesis was tested supports the proposition that it does.<sup>176</sup>

In that study, Loftus and Zanni found that "very small changes in the wording of a question" will influence responses.<sup>177</sup> In two experiments, "subjects viewed a film of an automobile accident" and were subsequently asked questions about what they saw.<sup>178</sup> For some of the questions, the definite article "the" was used, while in others, the indefinite article "a" was used.<sup>179</sup> Previous literature had been divided in their conclusions.<sup>180</sup>

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<sup>169</sup> *Id.* at 400 tbl.1.

<sup>170</sup> Loftus, *supra* note 80, at 561.

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* at 562.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (emphasis added).

<sup>176</sup> Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC'Y 86 (1975).

<sup>177</sup> *Id.* at 86.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* Loftus and Zanni report that "Muscio (1915) concluded that the more reliable form of question was one that did not use the definite article, whereas Burt (1931) reported that *a* and *the* are about equally suggestive." *Id.*

Loftus and Zanni note that implicit in the question “Did you see a broken headlight?” are two questions.<sup>181</sup> First, was there a broken headlight and, second, if there was a broken headlight, did you see it.<sup>182</sup> This logic dictates that if the responding party decides that, in fact, there was a broken headlight, then he or she should be fairly certain of his or her response to the second implicit question.<sup>183</sup> The researchers concluded that “[t]he problem that arises for a subject is that filmed accidents occur in the space of seconds,” much like the reality of eye-witness testimony, “making it nearly impossible to be certain of [the first question, thereby resulting in a response of] ‘don’t know’ much of the time.”<sup>184</sup>

Contrasting this scenario with use of the definite article creates a wholly different inferential chain. When the question is phrased with the use of the definite article: “Did you see *the* broken headlight?” the first question referenced above—*was there a broken headlight?*—is completely eliminated.<sup>185</sup> Loftus and Zanni hypothesized that fewer “don’t know” responses would result when the definite article was utilized.<sup>186</sup>

In the experiment, the subjects were informed “that they were participating in an experiment on memory and that they would be shown a short film” and subsequently asked to complete a questionnaire about the film.<sup>187</sup> Three questions inquired about objects present in the film and three questions inquired about objects not present in the film.<sup>188</sup>

The results were significant. Regardless of whether an item was actually present in the film, subjects presented with a question using the indefinite arti-

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<sup>181</sup> *Id.* at 87.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* The method of the experiment was as follows:

One hundred graduate students participated in this experiment, in groups of various sizes. All subjects were told that they were participating in an experiment on memory and that they would be shown a short film followed by a questionnaire. The content of the film was not mentioned.

The film itself depicted a multiple car accident. Specifically, a car makes a right hand turn to enter the main stream of traffic; this turn causes the cars in the oncoming traffic to stop suddenly, causing a five car bumper to bumper collision. The total time of the film is less than [one] min, and the accident itself occurs within a [four]-sec period.

At the end of the film, the subjects received a questionnaire asking them to first “give an account of the accident you have just seen.” When they had completed their accounts, a series of specific questions was asked. Six critical questions were embedded in a list totaling [twenty-two] questions. Half the subjects received critical questions in the form, “Did you see *a* . . . ?” and the other half of the subjects received them in the form, “Did you see *the* . . . ?” Three of the critical questions pertained to items present in the film and three to items not present. Subjects were urged to report only what they saw, and did so by checking “yes,” “no,” or “I don’t know.” Each subject received a different permutation of the questions.

*Id.*

<sup>188</sup> *Id.*

cle “*a* were over twice as likely to respond ‘I don’t know.’”<sup>189</sup> On the other hand, subjects to whom questions were posed that used the definite article “*the* tended to commit themselves to a ‘yes’ or ‘no’ response.”<sup>190</sup> Table 5 reflects “the percentage of ‘yes,’ ‘no,’ and ‘I don’t know’ responses” to whether items were, or were not, present in the film.<sup>191</sup>

TABLE 5: RESPONSES TO QUESTIONS BASED ON USE OF DIRECT OR INDIRECT ARTICLES IN PROMPTING QUESTIONS.<sup>192</sup>

Response Choices	Object Was Present in the Film		Object Was Not Present in the Film	
	“the”	“a”	“the”	“a”
Experiment I				
Yes	17	20	15	7
No	60	29	72	55
I don’t know	23	51	13	38
Experiment II				
Yes	18	15	20	6
No	62	28	69	56
I don’t know	20	57	11	38

The “Object Was Present in the Film” column demonstrates responses to the queries when the object about which the question was directed was, in fact, present in the film. The right-hand “Object Was Not Present in the Film” column reflects responses when the object was not present.

As noted by the researchers, “[a] major finding was that questions containing an indefinite article led to many more ‘I don’t know’ responses.”<sup>193</sup>

When an indefinite article [“(a)”) was contained in a question about an item that was not present in the film, “yes” responses occurred 6 [percent] of the time. When the definite article [“(the)”) was used, “yes” responses occurred 20 [percent] of the time. “I don’t know” responses occurred, overall, more often when the indefinite article was used (47.5 [percent] vs. 15.5 [percent] for the definite article).<sup>194</sup>

The conclusions support the hypothesis that the words used to form the question do, in fact, influence the answer or response.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 88.

<sup>192</sup> *Id.* at 88 tbl.1.

<sup>193</sup> *Id.* at 88.

<sup>194</sup> *Id.*

The source of this influence may, according to Loftus and Zanni, be the result of two possible scenarios.<sup>195</sup> First, they suggest that the definite article influences the responding party by producing a bias that favors a “yes” or “no” response.<sup>196</sup> The second possible explanation they propose “is that the definite article leads a subject [(the responding party)] to infer that the object was in fact present, causing for some a reconstruction in their original memory for the event.”<sup>197</sup>

#### *D. Phrases*

Just as descriptions paint pictures in the minds of the listeners, so do questions that seek a response. As Kassir points out, “[c]arefully chosen words can obscure and even alter people’s impressions, as when tax increases are called ‘revenue enhancements,’ and the strategic defense initiative is referred to as ‘star wars.’”<sup>198</sup>

Regardless of the reason, the results of these studies are consistent; the wording of the question can, in fact, impact the response. As mentioned earlier, the “reality” may be one that is “constructed and negotiated in the courtroom.”<sup>199</sup>

#### ACT V: POSSIBLE COUNTERMEASURES

*It’s counter to common sense, but common sense is only based on a very small subset of the universe.—Ian J. Davenport*

Federal Rule of Evidence 611(c) provides that “[l]eading questions should not be used on direct examination except as necessary to develop the witness’s testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.”<sup>200</sup>

The Advisory Committee’s Note to FRE 611(c) provides, in part, that “[t]he rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable.”<sup>201</sup>

As previously discussed, a leading question is defined as “[a] question that suggests the answer to the person being interrogated.”<sup>202</sup> Loftus and Zanni point out that “[w]hile an attorney can seemingly easily ‘sense’ when to object to a leading question asked by another attorney, the definition of leading is a

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Kassir, *supra* note 4, at 692.

<sup>199</sup> Danet, *supra* note 59, at 191.

<sup>200</sup> FED. R. EVID. 611(c).

<sup>201</sup> FED. R. EVID. 611(c) advisory committee’s note.

<sup>202</sup> BLACK’S LAW DICTIONARY, *supra* note 39.

long way from being precise. Any complete definition must eventually consider the subtle suggestibility that individual words can carry with them.<sup>203</sup>

If the research is accurate, then subtle variations of word choice in the formation of questions may impact and, in fact, manipulate answers.<sup>204</sup> The problem which is not addressed by the current rule but which, arguably, is recognized by the research, is that questions that are designed to manipulate the answer do not, in fact, suggest the answer. To ask “How slow was the car traveling?” certainly does not, in any way, suggest a particular answer. Contrast this wording with “Would you agree that the car was going less than thirty miles an hour?” Wording such as this certainly suggests the answer even though the responding party can clearly disagree. The research indicates that a question such as “How slow was the car traveling?” will yield a significantly different answer than “How fast was the car traveling?” Does the fact that the latter will yield an answer that would be different—statistically significantly different—than the former, create a problem?

Few modifications to FRE 611(c) could appropriately impact question formation to the point that any suggestibility would be effectively removed. However, the Rule might be modified to include a broad definition of a “leading question.” Such definition might include the use of words that, in the opinion of the court, would substantially impact a response to the point that the accuracy of the response could not be reasonably relied upon.

To be sure, this definition (as well as any substantially similar definition) could be argued to create more problems than it solves. First, it may be argued that the floodgate of objections would be opened thereby bogging down trials and requiring the judge to rule on many more challenges to questions that may or may not be leading as encompassed by the new rule. Second, one might argue that the proposed wording is too vague. That is, virtually any question might substantially impact the answer.

Recall that Harris presumed that use of the adjective “tall” in a question was unmarked—that is, a neutral adjective.<sup>205</sup> Specifically, the two questions presented were: “How *tall* was the basketball player?” and “How *short* was the basketball player?”<sup>206</sup>

In this case, Harris posited that use of the word “tall” was neutral and use of the word “short” imposed a psychological limit on the value thereby impacting, or influencing, the resulting response.<sup>207</sup> The data clearly indicates that the word variance impacts the response.<sup>208</sup> However, one could argue that both words are non-neutral. Arguably, the use of the word “tall” might indicate greater height. Certainly, paired with “basketball player” this theory is en-

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<sup>203</sup> Loftus & Zanni, *supra* note 176, at 88.

<sup>204</sup> *See id.*

<sup>205</sup> Harris, *supra* note 157, at 399, 400 tbl.1 & n.a.

<sup>206</sup> *Id.* at 400 tbl.1.

<sup>207</sup> *See id.* at 399.

<sup>208</sup> *Id.* at 401.

hanced.<sup>209</sup> However, the researchers also used a different context. They also use the “short” and “tall” words when questioning about a “bridegroom.”<sup>210</sup> However, the research did not discuss the use of a truly neutral word. A word such as “height” would have, ostensibly, eliminated any particular bias or influence on the subjects. Compare the original questions with this question: “What was the *height* of the basketball player?” Might this iteration of the question be more neutral?

Unfortunately, without specific research on the use of potentially true-neutral words, a conclusion cannot be reached. However, a comparison of the research and potentially true-neutral words can quickly demonstrate the possibility of a bias or variance based on the research conducted. Table 6, below, is a recreation of Table 4 with the addition of potentially true-neutral modifiers and questions:

TABLE 6: AVERAGE STUDY RESPONSES, BASED ON PROMPTING MODIFIERS, WITH PROPOSED NEUTRAL QUESTIONS TO AVOID LEADING

Original Question(Units of Measure) and Proposed Neutral Question	Modifier <sup>211</sup>
How ___ time did the man have between planes? (min., hr.)	much / little
What <i>amount</i> of time did the man have between planes?	<i>amount</i>
How ___ money was in the man’s wallet? (\$, ¢)	much / little
What <i>amount</i> of money was in the man’s wallet?	<i>amount</i>
How ___ was the set of weights? (lb.)	heavy / light
What did the weights weigh? <i>or</i> How much did the weights weigh?	<i>(none)</i>
How ___ was the quarterback? (lb.)	heavy / light
What was the weight of the quarterback?	<i>(none)</i>
How ___ was the office building? (stories)	high / low
What was the <i>height</i> of the office building?	<i>height</i>
How ___ was the plane flying? (ft. off ground)	high / low
At what <i>altitude</i> was the plane flying?	<i>altitude</i>

In the first example, the use of the term “amount” is, arguably, more neutral and, therefore, non-suggestive than either “much” or “little.” In the third example regarding weights, the sentence could be restructured in a way that eliminates adjectives that might be suggestive.

Practically speaking, a modified rule would be unlikely to have a positive impact in achieving neutrality among responders. A more likely approach for success would involve both greater research in the context of controlled mock adversarial proceedings coupled with the training of responders. Effective train-

<sup>209</sup> *Id.* at 400 tbl.1.

<sup>210</sup> *Id.*

<sup>211</sup> The top pair of words in each row is the marked and unmarked modifiers, while the bottom word is the proposed neutral option.

ing<sup>212</sup> with regard to techniques used to manipulate, or attempt to manipulate, responses might be the most effective mechanism to obtain accurate responses. That is, prepare witnesses to be ready for, recognize, and respond appropriately to questions crafted in ways that potentially might manipulate a response. The result might just be the evolution of a courtroom proceeding reflective of the actual facts in issue.

#### CURTAIN CALL

*There is no real ending. It's just the place  
where you stop the story.*—Frank Herbert

Did Jennie, Houdini's elephant, disappear? What about the Statue of Liberty? The research and accompanying data indicate that the answer is a matter of perspective. To the audiences attending Houdini's show or Copperfield's extravaganza, the answer is a resounding yes. Of course we *know* they didn't disappear—but it is a matter of perspective. Was the defendant driving that Corvette on Hammond Street? If the fact-finder believes it, then the answer is yes; even if he wasn't.

Many factors influence individuals. Words, actions, connections and context can all influence responses elicited from witnesses in a courtroom setting. When words lawyers use in a courtroom to craft questions, make arguments or otherwise describe events influence witnesses, ultimately decisions may be impacted. Similarly, the words of a magician impact how the spectator reacts to a trick.

The magician James Randi once said, “[a]llow people to make [an] assumption[] and they will come away absolutely convinced that assumption was correct and that it represents fact. It's not necessarily so.”<sup>213</sup> And, as Dr. Charles Reichardt noted, to “interpret answers to questions, you need to know exactly how the questions were asked.”<sup>214</sup> Dr. Kathy Kellermann concluded that “[q]uestions do more than convey and solicit information. Questions put words in people's mouths.”<sup>215</sup>

In the most important arena—that of our courts—because words, actions, and connections do make a difference, the question becomes how to countermand these phenomena in a meaningful way so that, to the extent possible, the truth at trial reflects the actual truth. Some changes to the rules, education of trial lawyers to become aware of these tools and the education of witnesses might provide some, albeit not necessarily enough, countermeasures.

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<sup>212</sup> See George Johnson, *Sleights of Mind: Science Meets Magic, Playing on What We Think We Know*, N.Y. TIMES, Aug. 21, 2007, at F1.

<sup>213</sup> *Id.* (quoting James Randi).

<sup>214</sup> Reichardt, *supra* note 69, at 12 (quoted in Beckman, *supra* note 44, at 30).

<sup>215</sup> KELLERMANN, *supra* note 33, at 29.