Sight. Some 80% of what juries base their decisions on is what they see. Indeed, because they cannot speak during the trial process, they depend on their sight even more than in everyday life.¹ Since only 15% of the human brain is used for language, the other 85% is left for everything else.² We believe what we see.

Of course, the physical appearance of witnesses and attorneys does make a difference. Attractive people are seen as more competent, friendly, and persuasive.³ But witnesses don’t have to be extremely attractive to be effective. Indeed, there is a U-shaped curve: a person can actually be too attractive. We can all relate to those who fall in the middle of the range of attractiveness, because that is where we see ourselves.⁴

However, what is much more important to jurors than physical attractiveness is a sense that attorneys and witnesses are genuine. Is the demeanor consistent with what he is saying? Is there a consistency in dress, attitude, behavior, manner, grimaces, gestures, and appearance?⁵ In one case, a juror said, “He (the attorney) kept saying how perfect her body was before the accident….he made her almost seem like a cripple, but we could all look at her and see that there was no neck brace, no wheelchair, nothing, you know? And we’re all just like…she looks fine to me.”⁶ In a loss of consortium claim the jurors all talked about the fact that the husband and wife didn’t sit together in the courtroom. They decided that the couple must be having marital difficulties.⁷ In one obstetrical case, the mother testified most convincingly that she was on the brink of welfare, but one of the jurors saw her park her BMW a long distance from the courthouse. It wasn’t that the BMW was the problem. It was that the jurors began to question whether the mother could be trusted in anything she said. It is not only what jurors evaluate while the witness is testifying that matters; it is also all the collateral information that they use to determine the truth of the words—from the time the witness arrives at the courthouse to the last time the jury sees him.

Order: primacy and recency. People remember best their first and last impressions. There is controversy about which is more important, primacy or recency; but our research, and research extending back to 1940, shows that primacy is most important in trials.⁸ In the seminal 1940 study by Weld and Danzig, mock jurors watched a live mock trial and made liability judgments throughout the trial. The judg-
ment at the end of the trial was consistent with their judgments after opening statements.\textsuperscript{9} We all have our first impressions. It is unavoidable. Once we have them, we tend to fit other information into that first impression and ignore information that contradicts it.\textsuperscript{10} While jurors report to us that they try to stay neutral, when pressed, they always had a first impression of the parties and attorneys—and this tends to be a lasting impression.\textsuperscript{11} When I asked a juror recently what her first impression was, at first she demurred, saying she hadn’t formed an opinion; but when pressed, she finally admitted, “Well, he looked guilty. He looked like he had been through this before. He wasn’t dressed up—like he didn’t care. It was reassuring to all of us to find out after the trial was over that he had been through the legal system before. We were right in our assessments.” In another case, the jurors very quickly decided that the defendant was “lying through his teeth.” He “did not come across as professional, trustworthy, honest.”\textsuperscript{12} It can’t be stated too strongly: Jurors need to have a positive first impression of attorneys and witnesses if we want to be successful at verdict.

**Attention span.** The average duration of attention span in the United States is eight minutes, and it is dropping.\textsuperscript{13} That does not bode well for a system where jurors are asked to sit passively and listen for hours, days, weeks. A short attention span reinforces the importance of primacy, of making a good first impression and setting a framework for jurors. The storytelling model of opening statements developed by Nancy Pennington and Reid Hastie provides such a framework.\textsuperscript{14} This model proposes not only giving jurors a story line but filling it in with people, dates, times—the more detail you give, the more effective this approach will be. There are three sources jurors use to create their own trial story: (1) the information presented in the trial itself; (2) the factual knowledge of social and physical rules that seem to apply to the case; and (3) their strategic knowledge—their own particular style of learning. What that means is that primacy and the short attention span dictate a need for more effort at the opening statement. As one researcher concluded, “Insofar as the attorney provides jurors with a meaningful, comprehensi-

ble story, complete with characters who are assumed to have specific goals and plans, (the attorney) may be contributing to the natural process by which jurors reason in deliberation.”\textsuperscript{15}

Jurors will learn best if they are given an opportunity to do it through more than just listening. We are visual creatures. Words are no longer our primary means of communication. One researcher described it like this, “Most people can listen five to seven times faster than a trial lawyer can speak. As we wait to hear more, our minds can drift onto another subject. At that point we miss a few words. Soon, we are missing whole sentences and may even stop listening altogether.”\textsuperscript{16} Increasing sensory perception, and therefore learning, is essential. Successful attorneys and witnesses do more than speak; they “paint the picture” through the words they use and the visuals they present.\textsuperscript{17} A picture really is worth a thousand words. And the picture that counts most is the evidence-demonstrative or real—that is used with fact witnesses. If the jury doesn’t learn from the fact witnesses, they have lost their best opportunity to understand the case from our perspective. We learn best from those with personal knowledge and juries are waiting to hear from those who were actually involved with the patient.

**Content.** None of us remembers very much of the content in what we hear. Even when we are trying to be attentive to what someone is saying, only 7\% of what is communicated comes from the actual words. Fifty-five percent comes from facial expression and 37\% from tone of voice.\textsuperscript{18} It is the old truth: How you say what you say is more important than what you say. If the way information is delivered is inconsistent with what is being said, people choose delivery over substance. Cases with favorable outcomes produced the following juror comments: “(The defendant) was intelligent and sincere while testifying”; and “the nurse did all she could under the circumstances and appeared ‘earnest.”’ In cases with unfavorable outcomes, this is what jurors said: The doctor “was disingenuous, pompous, and self-aggrandizing.” “He thought this was a waste of his time. We could tell that from the very first day.” “During cross-examination he was hostile, sarcastic, and immature.”\textsuperscript{19} In our own research, one
defendant was described as, “Arrogant! I felt like he was put out that he was being questioned about this whole thing. His explanation of things was like, ‘I’m not even sure why you are questioning me on this.’” “He was cocky. He was arrogant—he was very confident of himself, but not willing to accept any other opinions.” “His demeanor surely did not help him. I think if he had been a little less arrogant and a little more humble, he would have gotten a better response from the jury.” “He was flipping his pen around and looking bored. He didn’t seem like the most intelligent person. He didn’t help himself at all.” Notice that not one of the jurors had focused on what the witness had said, but, rather, on how they had said it and how they had appeared to them. To ensure that the evidence is the central focus of the trial, witnesses must present what they have to say in a credible manner, or the jury will not believe the message.

References

4. Ibid.
6. V. Hans, supra at footnote 16, p. 35.
7. Ibid at p. 33.
11. NB: See Hans, at footnote 16. This author’s experience studying jurors is that, because they are told not to form an opinion until all of the evidence has been presented, will hold to that line when talking with researchers. However, when pressed, they do indeed admit that they had significant and predictable first impressions.
16. N. Vidmar, supra at fn 29, p. 16.

Linda S. Crawford, JD, is Principal, Linda Crawford & Associates.