

Tipping, Framing, Blinking & Nod: The Art & Science of Settlement

It's clear to all of us in the litigation process that most cases settle before going to trial. But getting there efficiently and successfully remains somewhat of a muddy, often random process. Here are a few lessons we've learned:

Don't let settlement talks slow your trial preparation. In our experience, it is rare that lead counsel is *also* the attorney negotiating the settlement, because of the obvious conflicts of purpose and time. Without an agreement in principle, anticipating a settlement means disarming expert witnesses and the rest of the trial team in ways that are usually cost inefficient and damaging to successful trial presentation.

When you are in serious settlement negotiations, stick to your storyline; opposing counsel should know that you are ready and willing to go to trial, and should hear some of your strongest jury arguments. "Do not use their language," says cognitive scientist George Lakoff in his book *Don't Think of an Elephant*. "Their language picks out a frame (of reference) - and it won't be the frame you want." He goes on to say that the frame (or theme) that is most effective for you can often be "evoked by a word or two."

**At the constitutional level where we work,
90 percent of any decision is emotional.
The rational part of us supplies the reasons
for supporting our predilections.**

— Supreme Court Justice William O. Douglas

Visualize two or three of your key arguments. It probably won't surprise you that cognitive scientists have verified that humans are extremely suggestible — in fact much more

susceptible to what we see and hear than we realize. We think in *both* pictures (right brain hemisphere) and in words (left brain hemisphere). The pictures deliver powerful intuitive information. But when we try to *describe* the visual in words, we displace its clarity. So speaking (verbalizing the image) separates opposing counsel from the most instinctual and persuasive aspects of the image. Let it speak for itself.

This is important for litigators in the settlement process because both our plaintiff *and* defense clients have proven that a strong image has calculable impact on the value of their case. Using strategic images in recent mock trials and settlement conferences, defense teams saved \$8.25 million and \$437.5 million, and plaintiffs recovered \$137.5 million.