

Trial  
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**Feature**  
**\*28 REFLECTIONS ON MIRRORING**  
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We look for similarities in differences, and differences in similarities.

--Santayana

**Hello in there! Am I coming through? Is this registering?** Before a trial attorney starts to guess whether a message has been received the way she or he wishes, the question is more basic. Is the listener available to receive the message at all? Lots of lawyers are familiar with the sensation of staring into wide open eyes, dreading that the minds behind them are focused far from the point.

We can all ask for, direct, or even demand someone's attention. But the truth is that paying attention is not a wholly conscious activity. Attention cannot be bidden at will, politely or not. Volume won't always capture it--ask the parent of a teenager. Proximity won't guarantee it--people in your face can still forget every word you said before you finish speaking.

A flash of a cuff link can send someone in the jury box off on some reverie, despite honest efforts to focus. Noise can keep you from holding your mind still to watch and listen--ask anyone who has been distracted by a dripping faucet. Even a physical sensation, like an itch or a sore back, can totally turn your attention away from your intended object at unpredictable moments. [\[FN1\]](#)

If your client's case story needs full and focused attention to be seen and heard most compellingly, I suggest you connect first nonverbally, then verbally--the way the brain forms its most vivid memories and most compelling responses. The alternative is to risk offering factually and legally eloquent messages that nonetheless fall on deaf ears and glazed eyes.

By observing yourself and others, you can quickly establish that the greater the focus on someone's message, the more unconscious behavioral mirroring can be seen advertising that focus. This natural habit of adopting some behavior from whomever has our attention happens everywhere, with everybody. This habit can be used to almost instantly direct the focus and confirm the quality of your listener's attention at any time.

Mirroring is as easy as one, two, three:

1. Match some posture; gesture; facial movement; rate, tone, pitch, or volume of speech. You should do this for no more than 5 to 7 seconds.
2. Note the listener's unconscious responses. Though they take many forms, like a particular hand or foot movement, common responses include increased eye contact, head movements similar to nods, and turning the corners of the mouth.

3. Feed back that response you just noted as precisely as possible. Without this step, you've not established an exchange of communication, and you will not be able to confirm whether you have the level of attention you seek. By matching the listener's responsive movement--or sound--you offer the other person a chance to demonstrate his or her full attention. If you have it, the person will alter or amplify the response (head movement, hand movement, voice tone shift, eye focus, or facial expression) you just carefully fed back. All this will happen outside conscious note, but not without the listener's full attention.

This one technique is responsible for starting my career working with trial lawyers. It was in the early 1980s, after mirroring an opposition expert in discovery for a medical negligence trial, that John Carey, former president of the Minnesota Trial Lawyers Association, asked me to try teaching these techniques to some attorneys. He had noted each deposition answer the doctor gave became more detailed and forthcoming. Ultimately, this expert, who had successfully confounded plaintiff attorneys in many prior cases, had to be taken aside and reprimanded by opposing counsel for volunteering too much to John. The only difference from prior depositions was that here John decided to start by sitting like the expert.

### **Leaning my way**

Mirroring or matching some behavior of your listeners is the most effective means available to capture and then direct their full attention. The technique takes 10 to 15 seconds, does not depend on any spoken words, and yields a far more complete connection to the listener's mind than spoken messages alone. That is because mirroring allows you to approach people at the same mental level that the flashing cuff link, the errant noise, and the sudden itch all do.

The connection thus achieved, often \*29 called rapport, is active in the mind before pre-existing biases, values, and beliefs come into play. By mirroring one of your listener's mannerisms and his or her subsequent reaction, you can establish a connection with him or her that invites full attention, though the person may be consciously predisposed to disagree with your words.

Nevertheless, if you approached your listener with some respect for the real nature of attention and its unconscious, then conscious, layering, your listener will offer you points his or her full attention despite conscious biases. Do not expect the same attentiveness if you fail to mirror before offering up your words.

Here's how New Jersey trial attorney Tom Vesper recently described an encounter at deposition:

In a case involving a defendant previously deposed by my cocounsel, described to me as the most stubborn, hard-to-understand witness he'd ever deposed, mirroring worked a "miracle" of clarification. The defendant's prior deposition read like a bad Tarzan script--"me defendant, you lawyer." I decided to redepose this individual, disregarding my cocounsel's caveat that this was a waste of time. I was warned that this defendant was a former Nazi ... who didn't understand English, was difficult to understand, and basically was like talking \*30 to a wall. I arrived at the deposition early, and even before it started or before the defense attorney arrived, I greeted the man. He stood and formally bowed to me. I formally bowed to him. I immediately commenced mirroring as I got him a cup of coffee. He sat down, folded his arms across his chest, and leaned forward; so did I. He then took the oath, after which he placed both hands on the table. I placed both my hands on the table ....

This defendant, who had expressed difficulty in understanding basic questions in his first deposition, immediately admitted to me that he had taken several days to prepare his written answers to interrogatories as best he could with his wife; he also quickly admitted that he had performed an installation contrary to manufacturer's instructions [and] further [admitted] he had never gotten the manufacturer's instructions. At a time when the project was nearly over, he took them to the general contractor (another defendant in this case) ... and was told by the general contractor to ignore them! Obviously, defendant's counsel and defense counsel for the contractor were stunned by the flood of information I was getting from this presumed "Berlin Wall." [\[FN2\]](#)

Vesper said mirroring led the defendant to give more honest and detailed answers that went well beyond the

scope of the questions. At one point, defense counsel tried to stop him from answering a question by grabbing his shoulder. The defendant just continued talking with Vesper.

It is not always necessary to use mirroring directly to reap benefits for your client. Often, watching ordinary **mirroring** among others--in **negotiations** or in the jury box--can provide a great deal of valuable direction for your efforts.

I made this point for a roomful of attorneys attending a National College of Advocacy course a few years ago. I'd introduced some nonverbal techniques, including mirroring, to the group that morning. In the afternoon, we were all gathered to watch a mock jury deliberation on closed-circuit television, but there was sound trouble. While the glitch was being fixed, the attorneys and I observed the group selecting seats around the table before beginning deliberations. [\[FN3\]](#)

An attorney shouted to me, "Hey, Eric, tell us what they're thinking!" Several lawyers seated near me turned. I spoke to four attorneys sitting in front of me who were still facing the silent screen.

I can't tell you exactly what they're thinking, but I can tell you this. The woman in the gray coat will be the person to direct all the activity. The young man across from her [a law student, we had been told] will probably be suggested as the nominal foreperson, but he will still defer to her directions. The woman to her immediate left will be the one to talk first on most subjects. The younger, dark-haired woman directly across from Ms. Gray Coat will typically speak last. The older gentleman to her left will have to be prompted for any contributions, and Ms. Gray Coat will have the last word announcing a consensus, after which deliberations will come to a quick halt within five minutes.

Shortly after, the sound came on, and over the next 40 to 50 minutes, as each predicted response appeared, the lawyers would turn and stare at me. Later, they said they were most impressed not that the information had been advertised, but that I had gleaned most of it from watching the jurors speak about things like seating arrangements. The lawyers assumed, as we are all prone to do, that the subject matter of a discussion somehow controls the outcome. We presume that concepts drive our interactions: "Tell us what they are thinking so we may know what they will do." More often, it's, "Watch what they do to learn about their thinking."

What drove my guesses about the mock jurors was what they did without thinking. I looked for the connections they advertised, the alliances those predicted, and the sequence in which the topics discussed were introduced and disposed of by the group.

The connections between the jurors were visible by watching who was matching whom. The sequence of which person consistently shifted posture or gestures after someone else showed the order in which people would most likely speak when deliberating. And the way Ms. Gray Coat invited people to speak or to stop simply by moving the focus of her attention, without necessarily speaking, told me who would be directing things once we could again hear the conversation.

### **First things first**

During voir dire, opening remarks, and closing statements, effective trial attorneys try hard to reach jurors' conscious thinking. They endeavor to use plain English, they use common analogies, and they try to establish strong verbal anchors for major points.

Texas attorney Jim Perdue suggests that a smile is one of the most powerful tools a lawyer has when facing jurors. Perdue is accurate because a smile moves the attorney away from the most verbal and conscious ways of communicating a client's message toward the more powerful nonverbal forms of communication. Smiles sit right at the border between conscious efforts to capture attention and all those other means.

When testing perceived measures of rapport, communication researcher Frank Biernieri and his associates found that postural and gestural mirroring provided the strongest indication of a connection between people. Interestingly, they found study subjects whose job it was to rate the strongest factors associated with rapport discounted the importance of mirroring compared with smiles and eye contact, among several. In fact, however, mirroring was by far the most effective predictor of connection. [\[FN4\]](#)

This study shows the inverted reality between what people expect to be effective \*32 and what truly is effective when making connections. The more easily an action is consciously appreciated, the greater the expectations people hold for its success. People consciously understand the message passed by smiling. But the greater share of people's attention is accessible if you respond to them in line with how their attention actually functions--outside conscious thinking.

What will the effort to mirror judges, witnesses, and jurors get for you and your client? It offers full access to their focused, undistracted attention. This level of attention is the one where impressions, the first part of judgments, reside. Most of the life experiences that a person uses to appreciate your message also reside here. To get this level of attention, you must start at the nonverbal level and move down to the words.

There are many ways in which mirroring offers advantages to trial lawyers. Dozens of attorneys can confirm that in deposition a little mirroring goes a long way toward getting longer, more detailed, and even strategically harmful responses from both expert and lay witnesses.

Judges can--and have--been engaged by mirroring to the point that they refer to "hearing" arguments actually conveyed by purely nonverbal means. An attorney using mirroring let his opponent rant and rave on a motion while he just matched the reactions of the judge. The judge denied the motion after saying, "I've heard from both of you ...." Also, witnesses and clients can be helped to present their stories more effectively if your preparation time is spent working with their full, undistracted attention. Then, in court, you can actually help them regain that sharper focus using the same technique again when they begin testifying.

Mirroring allows you to track responses. For example, jurors can be seen adopting the postures and gestures of people in the courtroom with whom they've developed connections. They don't all mirror each other. Although not confirming agreement or affection, this signal does confirm who has that person's less-divided attention. In one of the earliest post-trial interviews I did, one juror repeatedly modeled the actions of the plaintiff's attorney when describing his thinking process in arriving at a plaintiff's verdict.

Mirroring among jurors, observed over time, often shows a sequence in which they respond over and over to things they are hearing and experiencing. That order almost always transfers to the jury room when they begin deliberating. Knowing the predilections of jurors who will probably speak first, second, and last can provide a wonderful chance to craft your case presentation to take advantage of that sequence. For instance, in the earlier example, if, after observing the order of the group's mirroring, you could see Ms. Gray Coat's friend on her left would lead each subject and you knew what the hot-button issues were for her in voir dire, you could form some guesses as to which portions of the case story would be most likely to be brought up first in deliberation. If those portions are not your particular strengths, you might want to shore them up more strongly in opening and during testimony along the lines of Ms. "Me First's" prevailing biases. Or, perhaps you could choose to offer different, stronger parts of the case characterized to be more acceptable to those attitudes. At a minimum, you would know that something would have to be done, for whom, and when. How exactly to go about it would depend on the specifics of your case, your presentation style, and your witnesses.

When dealing with biases, knowing which juror is more likely to fully attend to which other jurors offers you a chance to suggest and reinforce alternative biases to one or both parties to use to overcome some prevailing leanings in deliberation.

For example, after watching who shifted first, second, third, and so forth in a focus group, I had a strong idea

who would be directing one group's deliberations. So, even though the rest of the panel had some strong conservative leanings regarding the practice of suing doctors, this one young man was able to bring out early his prevailing beliefs about personal responsibility and the doctor's failure to "do all he could to protect the patient," shifting the tenor of the whole panel's discussion. The person who had followed him most nonverbally spoke up next and adopted the preventability language herself. So did the second person to speak after her, who was mirroring the first woman, who was following the young man. Naturally, in court, it will be you or a witness who is addressing the people the others are following, along lines they've declared important in voir dire, or on their questionnaires. But having that sequence to observe can be of tremendous value, and it's there to see in every case.

By mirroring both a witness and a juror in proper sequence--juror, then witness, then back to the juror--you can actually invite a witness to "target" select pieces of testimony to a particular juror, assured that the particular juror will have his or her full attention on that specific piece of the witness's message. You mirror the juror as you begin your question, passing to the witness as soon as you see a response. Then, as the answer is about to start, having mirrored the juror through the middle and end of the question, you are ready to "throw" the attention you've captured from the person on the stand back to the person whose attention you confirmed at the start, just as the answer begins.

After capturing a witness's attention by mirroring, you can invite that witness to either enhance or inhibit the memory as well as intensity in his or her expression of the memory. This is done by adding aspects like fully represented sensory language--weaving sight, sound, and sensation all together--and directing the witness's eye movements to areas where recall of information or emotional responses are easiest.

**\*33** Eyes up and to the left, for most people most of the time, garners remembered sights. Eyes up and to the right, on the other hand, tends to foster constructed or imagined images. There are eye positions for each of the three major sensory systems, advertising which one each person happens to be indulging at any given moment. The effort of mirroring anyone heightens your awareness of these and all other movements he or she makes.

If you first confirm the witness's full attention by mirroring, a whole array of methods for helping the witness tell his or her truth in the most effective way possible is in reach. If you can use mirroring well, you can begin to confirm within seconds whether you have, or have lost, a witness's, a judge's or a juror's full attention to parts of any message.

If you wish to be more effective in the use of visuals and verbal anchors that you hope to strongly associate with certain points, capture and confirm the viewer's full attention before you use the demonstrative aid or the key phrase. Establishing that connection first makes a big difference on the receiving end of the communication. Likewise, when you use other communication techniques, you are more likely to succeed if you've first worked to invite the person's full attention. Without applying mirroring before trying these techniques, your chances of failing rise rapidly even with simple skills like rhetorical questions or rule-of-three groupings.

Here's an example. An attorney familiar with mirroring and other techniques devised a pattern for use with opposing counsel or adjusters in one-to-one settlement talks. He would establish the starting negotiating positions, then mirror the opposition, feedback the nonverbal response, and wait for confirmation (amplification of the reaction). Then, he would ask a question-- usually phrased like "Is that all you've got?"--suppressing voice inflection and advocacy.

Having confirmed the person's full attention before asking, he had the best chance to read a response focused on the subject under discussion. Knowing something about his opponent's signals for agreement and disagreement (noted earlier)**\*35**

er in the conversation), he would listen and watch as the answer came out. If there was a sufficient mismatch between words of agreement and the nonverbal signs of denial, he would just sit silently. The opponent typically filled the silence--in the atmosphere of focused, complete attention--with a higher settlement number. Then, everyone would relax and talk some more until the attorney began the routine again.

Over time, he found he could predict the final amount his opponent would offer by proposing a few numbers aloud and watching the nonverbal reactions to each. But these predictions were most accurate only if he'd been careful to mirror well first. [\[FN5\]](#)

### Shattering myths

There are many myths about rapport and the use of mirroring to promote it. First is the myth of likability. It is an outgrowth of the presumption that impressions spring from conscious verbal sources. Many attorneys still believe that a juror has to like him or her for the juror to agree with the attorney's positions at trial. Yet, most attorneys have heard post-verdict comments like "You really were the far better lawyer. It's too bad that you had such a lousy case, because I really wanted to vote your way. Can I have your card?" Judgment, like attention, is not driven by totally conscious factors, and the likability many lawyers deem essential to success is primarily a conscious activity.

Another myth about building rapport through mirroring is that the responses involved somehow show dominance and submission. A person who will follow your gestures or postures in court is assumed to be submitting to your control. This presumption shows a misunderstanding of what mirroring is all about. As Dr. Paul Lisnek and I wrote in *The Complete Litigator*,

You will notice when you begin to use mirroring that people will appear to be following your every move. In fact, many people who train professionals in mirroring consider this their goal; that is, until you can demonstrably "lead" someone into following your behavior, you have not established sufficient rapport .... This interpretation ... ignores a critical fact about matching and mirroring behavior--that humans are almost constantly following one another's behaviors, postures, and stances. It appears \*36 that a human primate will match some of the behaviors of any other person in the vicinity, as long as that primate perceives no major threat. [\[FN6\]](#)

Another myth is that rapport between people implies agreement. Just because you have captured someone's full attention does not mean the person must agree with you, or submit to you, or even like you. People can cheerfully hate you, yet they can still discover themselves attending astutely to your message. Later during deliberations, these same jurors may find more of that message memorable, if not more compelling.

The confusion comes from the false presumption that decisions are a consciously driven phenomena. Once you set that bias aside, related assumptions about impressions, rapport, and mirroring will likewise fade.

Common worries about using mirroring include "getting caught" and "forgetting what I was going to say." In the former case, acknowledge that indeed you were sitting or standing as the other person was, but deny the fact that it was deliberate. Then pick something else to mirror and start again. In the latter case, take a breath and your thought will come back to you as it always does even when you're not practicing nonverbal techniques.

"What if the other person turns away?" is another common fear. That turning would constitute the response, at step two. Your job then will be to turn away exactly as the listener did. At that point, about half the people who turned away from you will turn right back.

One comment I frequently hear after a lawyer has tried mirroring in deposition, the best practice arena of all, is, "She wanted to tell me her entire life story." If you want this to stop at some point, just mismatch a behavior, and the person will tend to find someone else to focus on.

Though you can easily prove that unconscious mirroring occurs naturally, there will still be those who insist that using this natural response mechanism to capture someone's attention is somehow artificial. Attorneys who would never question showing conscious attentiveness will quickly question this allegedly manipulative \*37 way of inviting full attention. While open to any verbal devices to tell their client's story in the most compelling way, these

people balk at a 5-to-10 second nonverbal way to ensure listeners are ready to hear them.

### **Decisions, decisions**

It seems like we should be able to tell ourselves--or someone else--to attend to something and have it happen immediately, without distraction. It seems that way because in normal circumstances enough of our attention can be directed, or invited, to accomplish whatever task we've undertaken. But being in court is not a normal situation for most jurors.

Judgments start with impressions. Impressions start with attention to both the messenger and the message.

Judgments are formed first by an impression and only then justified from one of an abundant supply of rationales. It is not proven that jurors reach their conclusions by the end of opening statements, but even if it were, developing fluency with other aspects of communication ... would be even more important. ... It is the portion of people's minds outside conscious awareness that litigators must address, because that's the portion that develops impressions. [\[FN7\]](#)

Addressing that part of the mind is as easy as one, two, three. Why bother to do that? Because, first, you have to get their attention.

[\[FNa1\]](#). Eric Oliver is president of MetaSystems, Inc., a trial consulting firm based in Canton, Michigan.

[\[FN1\]](#). If you'd like to test the limits of conscious control over your attention, try this simple meditation exercise. Count your exhales, one to four, over and over for 20 minutes. While doing this, try to allow no other thoughts into your head but your counting and exhaling. You'll begin to get a sense of the multifaceted, other-than-conscious nature of what we call attention.

[\[FN2\]](#). Tom Vesper, Stories About Mirroring. 'Mirror, Mirror on the Wall ...', NEWS FROM THE MENTAL EDGE, Spring 2000, at 1 (emphasis omitted).

[\[FN3\]](#). 19 TRIAL DIPL. J. 299, 299-307 (1996).

[\[FN4\]](#). ELAINE HATFIELD ET AL., EMOTIONAL CONTAGION: STUDIES IN EMOTION AND SOCIAL INTERACTION 183-87 (1993).

[\[FN5\]](#). ERIC OLIVER, THE HUMAN FACTOR AT WORK 90-98 (MetaSystems, Inc. 1993).

[\[FN6\]](#). PAUL M. LISNEK & ERIC OLIVER, THE COMPLETE LITIGATOR: REALITY, PERCEPTION AND PERSUASION IN AND OUT OF COURT 35, 82-84, 110-12 (1993).

[\[FN7\]](#). Id.

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