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Listening for the 'Yikes!' Alarm
By G. Christopher Ritter

Justice Scalia: But I always thought ... the pollutant leaves the air and goes up into the stratosphere ...

Mr. Milkey: Respectfully, Your Honor, it is not the stratosphere. It's the troposphere.

Justice Scalia: Troposphere, whatever. I told you before I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth.

— *Oral argument at the U.S. Supreme Court in* Massachusetts v. E.P.A *on Nov. 29, 2006*

In this brief exchange about pollution, Justice Antonin Scalia is clearly experiencing what I call the "Yikes!" alarm. If you have tried a case, you've no doubt seen what happens once this alarm sounds off: Jurors (and, yes, judges) who had been leaning forward to follow your argument, suddenly pull back, inhale sharply and show evidence of thinking, "*Yikes*, there is no way I can understand this stuff!"

"Yikes!" alarms go off in courtrooms all the time. Despite the frequency, however, a "Yikes!" alarm in your own trial can be disastrous, because jurors will either stop listening to your argument ("Whoa, this is *way* over my head") or start resenting you ("This attorney is wasting my time!") Neither result is good because even if you eventually bring these jurors back on topic ("Oh, *now* I get it"), you and your case have suffered because the jurors — like Scalia — will not want to deal with your topic.

That's the bad news. The good news is that it's possible to present material to jurors in a way that doesn't trigger their "Yikes!" alarms. You just have to understand how people process new information and what makes them sit up, listen and *understand*.

THE NATURE OF THE 'YIKES!' ALARM

Although no biological textbook refers to it, the "Yikes!" alarm is a naturally occurring phenomena. The human brain can only process so much information; confronted with information overload, the brain begins to shut down. We've all experienced it, whether it was in a high school physics class, at a gas station getting directions, or at a CLE program on trust law. Too much information is hard to process.

Jurors hear the "Yikes!" alarm when faced with complex facts about situations with which they have little experience. Unfortunately, that happens a lot. Trials often involve complicated information; jurors rarely have much time to study it. And if they don't "get it" quickly, they start worrying more about whether they are capable of understanding your

information than analyzing the facts of your case, where they'll get lunch, or who's going to pick up the kids at day care. Yikes! You've lost them.

GETTING TO 'I GET IT'

Does this mean that jurors must understand every single fact in order to decide the case in your favor? Of course not. Jurors only want (and need) enough information to make what they feel is the right decision. Instead, the fact that new information makes people anxious means that new information must be presented in understandable ways. And in order to do that, you need to work with the two-stage coping process that people use to learn new material.

In the first stage, jurors connect at least some of the unfamiliar facts to familiar concepts. Once these connections are made, jurors progress to the second stage of learning. In this stage, the jurors add to their understanding incrementally, by "layering" pieces of information over each other.

Confused? The two-step process is really like using a garden lattice to grow plants. The lattice is the structure you'll use for presenting information (i.e., familiar concepts, images and ideas). Your new material is the new plant that is growing on that existing structure; each new plant adds complexity and new information. When your jurors step back, they'll see the "garden" (i.e., your argument) in its entirety.

A TOOL KIT FOR TEACHING

One of your roles as a trial attorney is to be a "Yikes!" security guard. You do this by developing courtroom teaching tools that will keep your jurors' alarms from sounding off. While these tools can take a variety of forms (e.g., trial graphics, tutorials, analogies) the most effective have the five following characteristics in common.

- They are succinct: The tools get directly to the point by using everyday, real-world language or concepts.
- They employ familiar concepts and ideas: The tools relate to something the jurors already understand. In other words, they find ways to compare new facts to things the jurors already understand.
- They leverage memorable imagery and stories: During deliberation, the jurors need to be able to recall the information that you presented during trial — even if that occurred weeks earlier.
- They create a "buzz": Your tools should make the jurors lean to the front of the jury box to learn more.
- They employ "pacing" devices: "Pacing" is just another word for presenting important material incrementally.

RADIATING COMPREHENSION

Let's say that you're defending a nuclear power plant against a suit brought by local residents. The residents want the plant shut down because it's exposing them to one millirem of radiation per year. Your job is to demonstrate that one millirem of radiation is not unusual or dangerous.

Of course, your first task will be to define a millirem of radiation. Left on her own, your expert is likely to tell the jury that "a millirem is one-thousandth of the dosage of an ionizing radiation that will cause the same biological effect as one roentgen of X-ray or gamma-ray dosage." That shrill beeping sound you hear in the background? It's your own internal "Yikes!" alarm going off — as well it should. Your expert has just lost the jury. Worse than that — you have just telegraphed to the jury that you don't care enough to take the time to educate them.

Imagine how much more effective your expert will be if she starts off explaining that our world is full of sources of very low-level radiation, such as the sun, rocks, consumer products, stone houses, even the very sky above us. In fact, in a given year, an average person is exposed to 360 millirems of "background radiation" from these natural sources — or rather, about one millirem per day. Her presentation is *succinct* and *familiar*.

To better explain your point, you produce a graphic about natural sources of radiation. But instead of showing the entire graphic to the jury all at once, you will "build" it, by adding understandable layers, bit by bit. Now your presentation is *paced*, allowing your jury to focus on the individual details while at the same time understanding your overall case.

You push your expert witness for more examples of how people get exposed to a millirem of radiation. It turns out that smoking one cigarette *in a lifetime* will expose a human to one millirem of radiation. So will most airplane rides. That's because the atmosphere is thinner up high and thus offers less protection from the sun. You then begin creating a demonstrative using this information.

In fact, your expert adds, when people go to the mountains to go skiing for a weekend, they expose themselves to a millirem of radiation, again because of the thinner atmosphere. So you illustrate this point and add it to your graphic, knowing that you're still being succinct and familiar and that you're still pacing the information.

The jurors may be slightly buzzed at this point. But you've held back the final zinger — the one fact that the jury will remember and tell others long after the trial is over (think *memorable)*. In this case, it turns out that certain foods give off a low dose of radiation. For example, bananas contain potassium, which has various radioactive isotopes. And that means (get ready for the buzz) not just banana eaters but virtually all of us emit very low levels of these radioactive isotopes. Moreover, if you sleep next to a banana eater for six months, you will have exposed yourself to — you got it — an additional millirem of radiation. So you illustrate this final point in your graphic.

Now the sound you hear is silence, not the "Yikes!" alarm. In fact, you may be hearing a few titters, a sure sign of a good buzz. And with those sweet sounds, you can rest assured that your jury understands the scary topic of biological exposure to roentgens of X-rays. You also know that they appreciate the fact that you took the time to explain a key concept to them in an understandable manner. And you know they'll remember and use what they've learned throughout jury deliberations. That's not "Yikes!" It's phew!

So now, Justice Scalia, let me tell you a few cool things about the troposphere ...

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