Prelude to Trial: Mediation in the Modern Age

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Trials have become less frequent in almost every area of litigation. Clients prefer the certainly achieved by controlling their own destiny though the use of mediation. Further, industry knowledge and analysis of trial outcomes has been raised to a level where verdict potential and settlement evaluations provide accurate information on the risk that is specific to the jurisdiction, cause of action and parties involved. This, coupled with the reduced costs associated with mediation, has resulted in an increase in the number of cases resolved through mediation and, in part, a decrease in the number of cases being tried to verdict.

Now more than ever, in our modern age, mediation has the potential to show the parties the same evidence the jury will see and understand the differences and difficulties of their case. Thus a strong presentation using the evidence in addition to argument will send a clear message that you are prepared and ready for trial and that the evidence favors your position. Oral presentations and legal arguments without imagery and use of evidence will not convey the same powerful message needed to achieve favorable results in mediation.

The Rules for A Successful Mediation:

Rule No. 1. Don't Waive Your Opening:

Mediation is important because of one fact; the parties (decision makers) to the litigation are in the room. It is your one opportunity to have an open, frank, informal discussion with them. It is an opportunity to convince them of your position, reason with them and cause them to lose confidence in their case. Don't waive this opportunity.

Some mediators will marshal the parties into separate rooms to begin caucusing immediately or give the parties an ***option*** to make an introductory statement. Be sure to insist upon this opportunity in advance of mediation. The opening statement or introduction is the most important aspect of the mediation process. It is the one opportunity you will have to converse, unfiltered, with the opposing party. The will be sizing up the attorneys and making a determination as to how their evidence and their attorneys compare. Make sure there is no comparison.

Rule No. 2. Know Thy Audience:

Chances are you have deposed or have experience with one or more of the decision makers in the room. Whether it is the plaintiff's attorney, the plaintiff or other decision makers you must tailor your presentation to their common goals and concerns as well as their individual interests. Your presentation must have something for everyone.

These decision makers must hear and see what the jury will evaluate—not just your argument. It is important for them to know why you are evaluating and valuing the case. What facts you are using, which ones you are discounting and why? Not just your arguments but the damaging facts of the case. Preferably these facts leave no room for debate or contest. If a witness testifies about the dangers and known risks associated with how the plaintiff was misusing the product—show the witness. If the instructions warn against the very activity engaged in by the plaintiff, show the warning in the manual, a picture of the warning on the machine and have the actual warning decal present in the room. There is no need to argue that the warnings were adequate and clear, the jury will see that from the evidence you will present at trial. There is no room for legitimate argument.

Parties to mediation understand there is risk in their case or they would not be participating in the process and, even the most astute trial attorney will admit

there is always uncertainty with trial. While they may challenge some of the facts the parties are not immune to the cost and expenses of litigation, experts, risk of getting nothing and delayed outcome and payment. Mediation is an excellent reminder of the additional work that needs to be done, the costs associated with same and the potential that their case could get even worse. Plaintiffs are mindful of liens and the benefits of structures and other financial instruments that can have a direct impact on overall settlement amounts. Remember you are trying to assist the attorneys bridge what can be a very large gap in valuation of the case. It is helpful to arm them with as much information as possible to evaluate the financial impact they are facing by proceeding to trial.

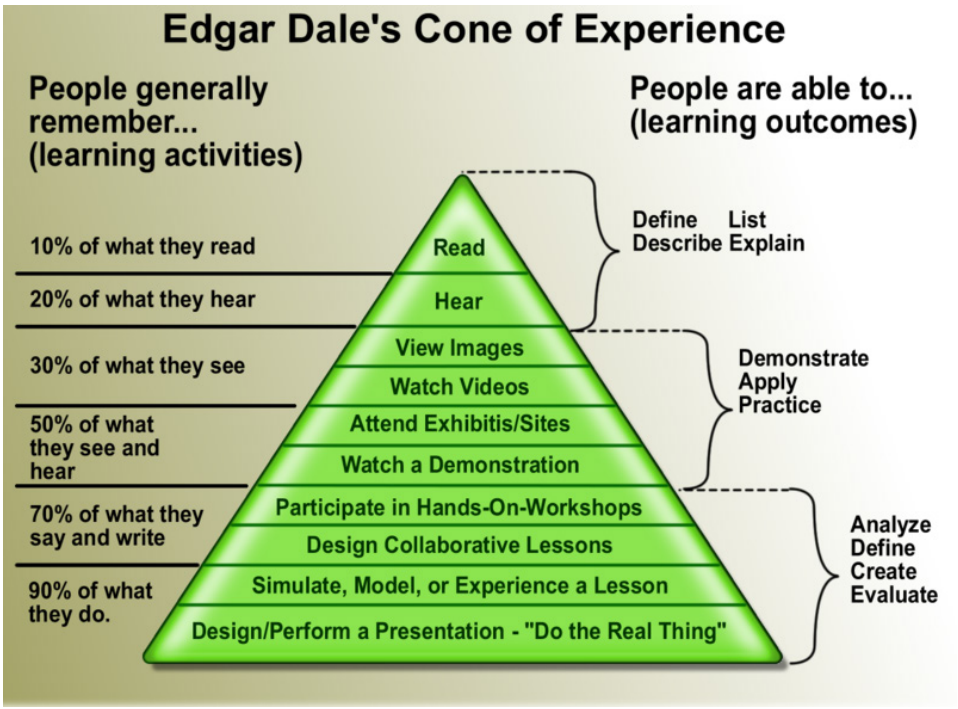
Rule No. 3. Use Tact, Be Professional but Assertive:

Emotion is present in all litigation. Whether dealing with a catastrophically injured person or their family members and former business partners tact is required to avoid anger and the risk of frustrating the mediation. That does not mean that counsel should avoid tough issues. They need to be presented and done so with great care and understanding. Again, it is not your argument but what the jury will see and hear that they must consider. By presenting the facts in a neutral manner you can reduce the animosity that might otherwise be directed at the messenger. Make the witnesses and facts the messengers of bad news.

As with any debate over an issue there are persuasive arguments that can be made in support of either position. These arguments must be acknowledged and broken down before your opponent for them to see your position. They may disagree with you, but they will have a harder time disagreeing with the evidence.

Rule No. 4. Use The Actual Evidence:

Nothing is as persuasive as the actual evidence. Often the plaintiffs have not seen the evidence. They do not have copies of the depositions, or color photographs of the scene, the drawings made by witnesses or know what their experts had to say. They have received whatever information has been presented to them through a filtered lens of their counsel. They will want to believe their attorney if they are given the choice between your arguments and recitation of the facts and what they have been told throughout the case. Show them the actual evidence and they will have a hard time challenging the testimony of their friends, family, co-workers and experts. It is this information that your opponents will remember, just as the jury will remember the visual evidence you present. When the opposing party returns to their room to caucus you want them to be discussing what they saw because they will have already forgotten what you said. Make sure what you showed them is compelling enough to guide their conversation in the right direction.



Rule No. 5. Show Them What They Said:

Depositions, statements to first responders, medical records, and admissions are extremely important. Memories are fleeting but the evidence of what was said is unchangeable. They can try to explain it away, and they may have a good excuse for their prior statements, but it is extremely persuasive for them to hear and see how their statements will be perceived.

Mediation is the perfect opportunity to remind the plaintiffs what they said. It is easy to blame others for not understanding the case or making a misstatement. However, if a plaintiff sees his or her own testimony it may cause them to remember or at least confront some of the problems with the case.

Rule No 6. Show Them What Their Expert(s) Said:

Often experts say the most ridiculous things or make opinions based on a limited understanding of the facts or industry knowledge. Many times the plaintiff has not even met their expert let alone reviewed their report or seen their testimony. If your opponent intends to rely on expert testimony and conclusions, it is important to show how those conclusions are flawed and how that expert will come across at trial. Turn their strength into a weakness by introducing them to some of the problems with their "experts" case.

Rule No. 7. Use Juxtaposition (Fun With Social Networks):

Social networks have given us unfiltered information—use it. Often we have unfettered access to photographs of plaintiffs and a day-to-day diary of the most inane aspects of their lives. Whatever event or occurrence is the basis of their lawsuit often becomes a commentary for their friends and family which can be very insightful.

"As a result of the explosion I lost grip strength in both of my hands"

After accident rock climbing photo's suggests his grip strength is looking pretty good.

Rule No. 8. Reinforce Evaluation of Facts—Not Argument:

Remember arguing your case before an emotional party may not have the desired effect. They will tend to disagree with your statements and believe you are ignorant of what they know to be the facts of the case. Showing the evidence and telling the opposing side that you are not trying to convince them of your position, but merely ask that they review the same evidence you have reviewed will have a strong impact. It is your goal to make them understand why your client's position is reasonable. Use of the facts provides the explanation for your position and will cause the plaintiff to consider and potentially question what they believe to be the facts.

Rule No. 9. Acknowledge Opposing Position & Evidence:

Do not hide from the bad evidence. Acknowledge it, distinguish it and move on. As in trial, ignoring the bad evidence will not make it go away. That said, your opposition may not have focused on all of the "bad" evidence or even the worst. It goes without saying, only use those theories, positions and evidence that the opposition has pushed during the case—not what you see as the difficulties in the case.

Rule No. 10. Invite Dialogue:

This is your one and only opportunity for an informal dialogue with the plaintiff. Invite them to comment on the evidence they have seen. Suggest they ask how their attorney intends to overcome these issues at trial when they get back to their room.

About Jon Barton

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Jonathan Barton is a shareholder of Sandberg Phoenix & von Gontard. He is a member of the firm's products liability practice group and is active in the firm's general litigation and business litigation practice. Jon is engaged in all aspects of litigation from the initial claim investigation stage through trial before the bench and jury in both state and federal courts. He has extensive experience in defending products liability cases involving a wide array of industrial machinery, motorized vehicles, electrical components (including medium and high voltage equipment) and consumer goods. Jon is also experienced in cases involving fire science, premises liability, transportation law, intellectual property litigation and insurance defense.

Jon is a regular speaker to members of the Missouri and Illinois Bar as well as attorneys and general counsel on a national basis. He presents seminars on issues involving integration of technology during the discovery process and at trial as well as advanced trial and deposition skills and techniques. Jon also hosts a yearly web seminar on ethics from the litigator's perspective.

Jon received the honor of being named by Missouri Lawyers Weekly as one of the Up & Coming Lawyers in Missouri for 2008. Missouri & Kansas Super Lawyers named him a Rising Star in 2010 and a Super Lawyer in 2011 and 2012 in the area of Personal Injury Defense: Products. He was chosen as one of the St. Louis Business Journal' s "40 Under 40" recipients based on his career achievements and community work. In addition, Jon received an AV Peer Review Rating on Martindale Hubbell which was given by his peers for his high level of professional excellence.

Civic Activities

- Volunteer: St. Louis Lawyers and Accountants for the Arts (2001 to present). Board of Directors (2011 to present). Routinely assists artists with questions concerning the law with a special emphasis on intellectual property issues.
- Volunteer: Bar Association of Metropolitan St. Louis (2001 to present). Volunteer yearly as a guest judge for the high school mock trial competition.
- Adjunct Professor: Washington University. Coach of the national intercollegiate mock trial team - 2003-2005.

Professional Activities

- Member of the Order of Barristers and is the recipient of two consecutive Lewis F. Powell, Jr. Awards for Excellence in Advocacy, issued by American College of Trial Lawyers.
- Chairs the firm's Technology Committee and serves on the firm's Professional Development Committee.

Education

- Juris Doctor, with honors, Drake University School of Law in 1998
- B.A. in Political Science, Saint Louis University in 1994