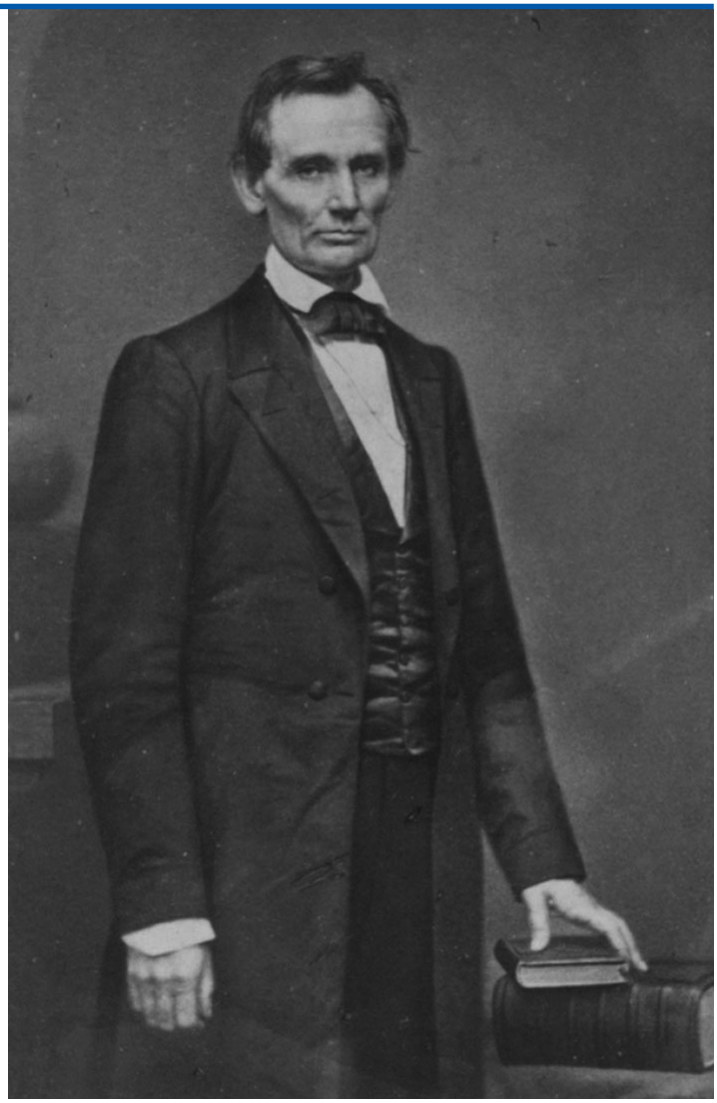

MATHEW BRADY (1860)

Building coalitions through storytelling

Mediation is not all about the law. The story of the case must be told well, just like the unfolding of a movie or book. Abe Lincoln the trial lawyer did it well.

By Jeffrey Krivis

Evaluating the risk of winning or losing a lawsuit and the reward of damages is based on probabilities, statistics and data. Some commentators refer to this as "objective criteria." (See: Getting To Yes, Fisher and Ury). Others observe that if other incidents happened in a similar way, that the mediated resolution should likely be the same. As a result, decision makers categorize disputes based on historical data and walk into the mediation room armed with a pocketed case value set in concrete.

In an effort to sort out this information, lawyers are keen to ask the mediator to help understand what the other side is basing their evaluation on. The predictable response is that the value is based on data and experience from previous cases, coupled with a sprinkle of subjective analysis of witness credibility; decisions are made on case value. With predictability in case evaluations and mediator responses to these obvious questions, the mediator becomes paralyzed and the case follows a formulaic path toward conclusion. This approach is actually successful in many cases, particularly in repetitive disputes. Many trial lawyers will accept a resolution if it represents a fair market value. However, trial lawyers who do not want to reduce their case to a statistic or probability often conclude that the narrative or story of the case was not properly understood by the other side, resulting in an unsuccessful mediation.

What's the story?

The famous psychologist, Daniel Kahneman, analyzed this problem after studying statistics and probability for years, and said: "No one ever made a decision because of a number. They need a story." In other words, decision makers with preconceived values will not move off those values in repetitive type cases without being moved by a narrative that is unique.

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Author Robert Dickman noted, "A story is a fact wrapped in an emotion that can compel us to take action and so transform the world around us." This observation is precisely what occurs between great trial lawyers and jurors in a courtroom. For some reason it rarely occurs in a mediated negotiation.

In order to be more effective in mediation, the story of the case must be told just like the unfolding of a movie or book. Like any story, there is a common structure that has a beginning, middle and end and is broken down into three acts.

Act One

Act One is where the principal character experiences an event that disrupts his/her life. Take for example, a sexual harassment case. The victim receives uninvited text messages from a supervisor that ask for sexual favors. This is highly disruptive and results in a lawsuit for damages. The conflict has surfaced; the scene is now set and the audience eager to learn what happens next. Imagine a claims attorney asking you or the mediator to fill them in further on the developing story. Enter Act Two.

Act Two

Act Two is where the principal character has some success developing the storyline by sharing facts about the situation and building coalitions with the decision makers such as human resources personnel and corporate or claims counsel. These folks represent the jury on the case. Telling the story to this panel of deciders cannot be done in the dark to be effective. A transparent approach with visuals and direct dialogue has the most impact, just like in a court of law.

Jurors are in essence coalitions sitting in court with a common objective of affecting an agreed outcome. A coalition is defined as "a group of individuals and/or organizations with a common interest who agree to work together toward a common goal." The process of achieving a common goal in mediation is akin to the world of politics where the purpose is to persuade someone to vote for your side.

In politics, the voters on the extreme ends of the spectrum tend to vote the same no matter what information or narrative is presented. What turns an election

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is influencing the centrist voters that it is a safe bet to shift their position. These critical voters are the decision makers in litigated cases as well and tend to be influenced by their peers to adopt familiar and comfortable behaviors, strictly on an emotional basis. Stories take the complexity out of statistics and data and help centrist decision makers rationalize outcomes based on gut instincts. These instincts are the raw material mediators use to build a coalition and encourage movement in negotiations. Once this occurs, enter Act Three.

Act Three

Act Three is the final act and involves the principal character moving heaven and earth to achieve an unexpected outcome. This is the point in the story where the trial lawyer has convinced the centrist decision maker that probabilities and statistics might not fly in this particular case and it is worth reassessing under a different lens. This occurs because coalition building was successful, and the pieces of the puzzle are in place and ready to act.

What trial lawyers do

As great storytellers, trial lawyers understand that within each of the three acts they need to draw the jury into sharing a reconstructed reality of past events so that they can "see" what happened even though they are not present. It reminds people of their identity in relation to each other and provides a form of shared reality that can be seen as authentic and worth agreeing to. Stories are the means for destroying mindsets or shattering complacency, often known as preconceived positions that are the stuff of statistics and probabilities. By combining elements of the story with current reality, trial lawyers construct a new reality.

All stories require character buildup, conflict and resolution. Great trial lawyers include four components to all their cases: 1) *Passion* – the emotion that is wrapped around the story's central fact; 2) *Hero* – the character who gives the audience a point of view; 3) *Antagonist* – gives the action of the hero direction and focus; 4) *Transformation* – heroes take action to overcome their problems, and they and the world around them have changed.

When these components come together, the process (whether trial or mediation), is a movie in and of itself, and the jury is happy to reward the protagonist.

Application to the mediation room

In the mediation room, the movie unfolds in a less coercive and more inquisitive way than the argumentative or adversarial style used in courtrooms. This allows decision makers to be moved by elements of fairness, common sense and compassion to help a person that has been wronged rather than strictly by legal analysis.

The challenge in mediation is that most of the process is conducted in a hidden fashion behind closed caucus doors, where the audience is patiently waiting for the story to energize. Trial lawyers deputize the mediator with storytelling responsibility. This leads to less transparency and slower developing scenes. It's like presenting a case to a jury but asking the judge to explain the evidence as opposed to hearing from witnesses directly.

Picture yourself in a movie theatre where the scene drifts around for several minutes or longer with no real purpose. Some people leave the theatre; others are trying to stay awake. Eventually the story gets to the punch line and whoever is awake will try their best to finish the movie. While some mediators are great at filtering the story to the other side, others simply pass on information without the emotional clout or drama of a trained trial lawyer. Filtering a story that has impact through a third party can sometimes reduce the persuasion factor substantially and result in misinterpretation by the intended audience. This is particularly true in a sexual harassment claim where credibility and misinformation are in play.

Lincoln could tell a story

Abraham Lincoln was known as a seasoned trial lawyer. He liked to tell a story to the jury with the direct goal of shattering preconceived positions. It goes like this: "A farmer back home was sitting on his front porch when suddenly his 6-year-old son came running from the barn saying, 'Father, father, the hired man is in the hayloft with Big Sister. The hired man is pulling down his pants and Big Sister is lifting up her skirt, and I fear that they are going to pee on the hay.' 'Now son, you have all the facts right but you have reached the wrong conclusion.'"

While having Abe Lincoln present evidence might not be feasible, great trial lawyers can be just as effective in a mediation setting as they are in a courtroom. That's not to say that having the mediator present evidence through shuttle diplomacy is a bad thing. Indeed, it can be very effective, particularly when there is a strong piece of evidence that will likely elicit a serious response that permits the other side to save face in front of the mediator. This is useful and persuasive as well. It's knowing how to balance that introduction and presentation of evidence while hiding behind closed doors that makes the difference.

If the mediator suggests that unfolding the story will be more impressionable if the trial lawyer presents it directly to the decider, take advantage of it. Realize that the mediator is moving the scene through one of the three acts and setting the stage for the unexpected. Also, people will respond emotionally to a direct approach as opposed to a word summary by a neutral. Naturally these decisions depend on the nature of the case. For example, non-transparent shuttle diplomacy behind closed doors is more appealing than direct dialogue in, for example, a wage and hour class action where economics and statutory interpretation drive the dispute, while direct presentation of evidence can be more effective in a sexual harassment case.

Guidelines for presenting evidence in mediation

The wonder of mediation is that it allows trial lawyers to adapt different

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types of disputes to different processes. "One size fits all" does not work unless the case is repetitive and predictable. Certain types of tort cases with generalized injuries fall into this category. Shuttle diplomacy behind closed doors is better for these cases unless something unique can be surfaced such as a story about broken dreams. Examples include the sports figure who is the victim of medical malpractice and can't pitch again, or the musician who loses a finger and can't strum the guitar. These are exceptions to the rule but happen occasionally and require more direct, transparent storytelling.

Business disputes

Business disputes with complex economic analysis can adapt some storytelling techniques that are strategically designed to focus the other side on data that tends to be dry when presented. In a recent dispute, the plaintiff trial lawyer asked to present a PowerPoint to the defense that summarized findings from an accountant's audit in short, bite-sized pieces. The trial lawyer asked that the other side simply watch and listen and not engage in back and forth responses. This was highly effective and saved hours of mediation time because it wasn't filtered through a shuttle diplomat. Once the defense had a chance to marinate on the information, they too asked for and received a similar opportunity to respond in a principled way to the points made. Thereafter the mediation turned to shuttle diplomacy that quickly and effectively settled the matter.

Employment cases need good witnesses

Employment cases have a continuum of ways to advance the evidence. Good witnesses can make or break a case. If the plaintiff is presentable and credible, it is worth figuring out a way to give the plaintiff an audience with the decision makers through a short but focused question and answer period. If the plaintiff is not presentable or credible, the narrative can be advanced through private attorney-to-attorney meetings and/or caucused diplomacy through the mediator.

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Class actions with complex legal issues

Class-action cases generally involve sophisticated legal issues. Exchanging position statements interpreting those issues in advance of the mediation is a better substitute for storytelling. It avoids the typical argument phase of a case and allows the mediator to identify and address focused areas of dispute that can impact the risk calculation. Be cautious in exchanging damage analysis in writing as assumptions might change and/or federal court removal might be warranted. That said, straight-caucused diplomacy is the preferred method for this type of dispute.

In short, the father of the modern mediation movement, Frank Sanders, observed that one must try to "fit the forum to the fuss." As a process, mediation is a forum that supports trial lawyers in applying their courtroom storytelling techniques in a structured way that allows for optimal persuasion. There is a missed opportunity to paint a unique picture of a case by substituting others in place of the trial lawyer to tell the story each time.

Final word

A major magazine voted Albert Einstein the most important person of the 20th century. He was a superior scientist, he loved music and he was mystical. Einstein said, "God does not play dice with the universe." Yet he had a horseshoe on his door. People asked Einstein, "Surely you don't believe in that?" He replied, "I understand it works whether or not you believe in it." Keep that in mind as you plan your next mediation.


Krivis

Jeffrey Krivis has mediated thousands of cases since 1989. He and his partner, Mariam Zadeh, are the principals of First Mediation, *based in Encino. He regularly handles cases in San Francisco and Carmel/Monterey. www.firstmediation.com.*