

Effective storytelling brings faster, better settlements

By Robert S. Mann

In previous articles I have stressed the importance in mediation of developing an effective story and communicating that story in an effective way. Every good case (and every good defense) has a story. In fact, if you can't fit your plaintiff's case or your defense into a story, you might want to reconsider the strength of your position because without a good story no trier of fact — whether judge, jury or arbitrator — is likely to respond positively and your opposing counsel and mediator may be equally unimpressed.

Sometimes, however, you can have a great story, but have difficulty in presenting the story in an effective way. In a recent mediation the defendant had a good story to tell — the plaintiff appeared to have lied, in a writing, about a material issue — but the defendant was not only unable to tell the story in an understandable fashion, his anger and hostility were so great that they overwhelmed the bad conduct of the plaintiff. It was hard to sort out the facts and hard to feel any sympathy for the defendant, and these factors played a significant part in the resolution of the case.

In thinking about this case after the mediation, I was reminded of a course that I attended over 20 years ago in communication techniques for lawyers, taught by Katherine James and Alan Blumenthal of ACT of Communication, a consulting company located in Los Angeles. Katherine and Alan are trained, professional actors, and have built a successful business on helping lawyers and their clients communicate more effectively — or, to put it more simply, to become better story tellers.

As it happened, shortly after I attended the class, my prior law firm undertook to represent a client in a business litigation matter. It shortly developed that we had a major challenge with our client — he had been wronged in a business transaction and had lost a substantial amount of money, but he was simply unable to tell the story about what had happened. No matter how we approached it, he would only give us one-word answers and trying to get him to describe the events was like pulling teeth. His testimony was stilted and unconvincing. We decided to consult with Katherine and Alan. They asked us to conduct a mock direct examination with the client. After observing this painful process, they formed a hypothesis that the difficulty arose from our client's embarrassment about the facts. Katherine and Alan surmised that our client, who considered himself a very smart and sophisticated businessman, was hugely upset that he had been "taken," and as result, he felt ashamed of himself and was unable to tell the story.

To overcome these problems, we first started with these exercises

to encourage our client to trust us more. Somewhat to everyone's surprise, these exercises, which seemed rather formalistic, actually worked. Katherine and Alan then suggested to our client that perhaps his reluctance to tell the story was connected to his feelings of humiliation. It was fascinating to see how this played out. Our client almost immediately recognized that he was, in fact, feeling discouraged, humiliated and upset and that these feelings were preventing him from telling the story. When he realized that the whole purpose of the lawsuit and the legal system was to provide a forum for him to tell the story and to right the wrong that had been done, he opened up and he was able to describe what happened in an effective and convincing way.

Katherine and Alan have developed many effective and specific techniques for improving communication and making presentations more effective. I asked them to share some of the techniques and they provided a couple of exercises that they have found to be consistently useful.

The "story switch." Have your client tell a story about some wonderful part of their lives, such as meeting their spouse. Then switch to the story of the case. As the client flips back and forth, the freeness with which the "good" story is told begins to rub off onto the tight and impersonal story of the case. This technique is also helpful in dealing with the angry client. It's nearly impossible for the client to be consumed with anger while telling the "good" story, because the client is likely to be laughing or smiling during the "good" story. These positive emotions rub off onto the "case story" as you flip back and forth.

"Beyond eye contact." Many clients

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get so caught up in themselves that they are telling that the reason that they are telling a story is to connect with and affect another person — in this instance, the mediator (later, the trier of fact). The lack of connection negatively affects the presentation. In the exercise, you make eye contact with your client and then take his or her hand, as though you are shaking hands. Then ask your client something that you are likely to ask at the mediation, such as, "What was it that made you know that things were going downhill?" Your client has to look at you and make eye contact while you are holding his or her hand — through this process your client will gradually understand how



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to make the eye contact connection. Give your client some feedback — if your client looks away say, "Stop. Breathe. Try again." When you have made a connection, try it again, this

time tell the story in a credible way, is the client "likable." Many times the intangible issues turn out to be more important in a given case than the purely legal or factual issues (in many cases, liability and damages are clear, but the outcome of the case remains difficult to predict because of the personalities involved).

Some of the same considerations apply to the lawyers. Are the lawyers communicating in an effective manner? Are the lawyers "likable" and persuasive? Are the lawyers concentrating inappropriately on "technical" or otherwise unimportant details and losing the big picture? Are the lawyers and the clients not communicating well?

When a mediator is convinced that a client and his lawyer will "make a good case," which is really just another term for "telling a good story," that conclusion becomes important in the mediation process for many reasons. First, although mediators don't judge cases, they, like everyone, are influenced by the quality of the story. Second, the mediator is likely to convey to the other side that the party with the convincing story may do well at trial — and this is an important factor to consider when analyzing the overall settlement value of the case. Third, in cases where it's a "close call," an effective

presentation or a likable, convincing client may have a tremendous impact on the result — something that everyone will need to consider when deciding how to resolve the case.

Taking a couple of steps back, effective story telling starts before you show up at mediation. Both you and your client must think about the story and how to tell the story effectively and persuasively. Your mediation brief, in this regard, because it is the mediator's first exposure to the case, must tell the story effectively and persuasively. The goal of the effective, storytelling mediation brief is simple: you want the mediator to be able to say to himself or herself after reading the brief: "I get it, it makes sense, and I think that this is likely to sell to a judge or jury." When you arrive at the mediation, your goal is to further support the story you have already told. At a very basic level, a plaintiff's story is always the same, it's a variation of "I've been wronged — I was damaged and I'm entitled to be compensated." At the same basic level, the defense story is also simple: "I'm not at fault — you weren't damaged and you aren't entitled to compensation." You and your client must be prepared to communicate these simple themes, in an effective and persuasive way. This means that you and your client

need to concentrate on the theme of your case, leave aside unimportant details, and tell the story with emotion and honesty. As Katherine and Alan would say, you must "speak from the heart."

Effective storytelling and the presentation of a persuasive case will almost always translate into better settlements.

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