AAJ Education's Persuasion Techniques for Remote Hearings and Bench Trials Webinar

AAJ Webinar
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Faculty Include: Betsy K. Greene (moderator); Honorable Beau A. Miller; Honorable R.K. Sandill; Eric G. Oliver; Kelli B. Hooper

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JUDGE'S PERSPECTIVE: EFFECTIVE PERSUASION TECHNIQUES

DIFFERENT PERSPECTIVES: PERSUASION TECHNIQUES FOR REMOTE HEARING AND BENCH TRIALS WEBINAR

SEPTEMBER 1, 2020

The Honorable R.K. Sandill

- Judge Sandill is the Presiding Judge of the 127th Judicial District Court, Harris County, Texas.
- Judge Sandill is a graduate of the University of Texas at Austin and the University of Houston Law Center. He is a former briefing attorney for Ret. Justice Murry B. Cohen of Texas's First District Court of Appeals. During his years of practice, he focused primarily on employment, commercial, appellate, and covenant-not-to-compete litigation.
- Judge Sandill is married to Kelly Spragins Sandill, an attorney with Hunton Andrews Kurth, LLP.

The Honorable Beau A. Miller

- Judge Miller is the Presiding Judge of the 190th Judicial District Court, Harris County, Texas. Before election to the bench in 2018, Judge Miller was in private practice, representing a wide range of clients in commercial, products liability, and Section 1983 litigation. From 2001 through 2003, Judge Miller was a law clerk to The Honorable Ricardo H. Hinojosa, United States District Court, Southern District of Texas, McAllen Division. Judge Miller received his J.D. from The University of Texas School of Law and serves as the Permanent Class President of the Class of 2001.

- Prior to his legal career, Judge Miller was the Associate Director of Bands at Stephen F. Austin High School, Austin, Texas. He graduated from Louisiana State University with a Bachelor of Music Education degree. He also served as the Drum Major of the Golden Band from Tigerland.

Virtual Hearings/Trials

Virtual hearings/trials could be here to stay…

- Past
- Present
- Future
  - Cost of virtual hearings
  - Efficiency of time
  - Can be more congenial

Being Persuasive with Virtual Hearings/Trial

Preparation = Persuasion

Exhibits

- Coordinate with
  - Court
  - Court Reporter
  - Opposing Counsel
  - Witnesses

Demonstratives

Ability to share screen

Sharing with opposing counsel prior to hearing

Sharing with Court prior to hearing

Connectivity and Witness Familiarity

- Ensure the witness and counsel (or help) are familiar with the technology
- Also ensure that there will not be drop off or unforeseen technology Issues (microphone/lighting/wifi)

Performance In The Hearing

Keys to Success

- Be on time (early=on time)
  - Make sure witnesses are also on time
  - Make sure all parties are properly connected to audio and visual before making an appearance
- Dress professionally, a zoom appearance is still a court appearance
- Have an appropriate background for the hearing (set up a virtual background if necessary)
- Have appropriate lighting set up for video
- Have an appropriate screen name

Etiquette

Ask	Ask court if they need a recitation of motion (because a lot of courts are virtual, they have time to read the motions prior to hearing) motions are much more important now
Understand	Understand that in many situations the Court will have allotted you certain amount of time
Tone	Much more conversational and contemplative setting
Ask	Ask permission before taking over hearing (share screen, engage a witness, or share files)
Dress	Dress like you are in a judicial proceeding (even if it is just the top half)

Tips: Cont'd

- Be specific in your argument; give cites to record or case law if that may be pivotal
- Offer to do post-hearing briefing (keep it short)
- Know your judge; ask to argue your full motion if appropriate

Post-Hearing

1

Get post-briefing in quickly – most courts have hearings all morning/all day (likely not to rule on issue before end of day)

2

File and email any post briefing hearing to clerk

3

If parties resolve issue before Order is signed, please notify Court ASAP (credibility)

Other Things To Consider

- Ask for permission from the Court before sharing your screen.
- Before sharing your screen, be sure to close all windows or documents that you do not wish to share.
- Call counsel and all hearing participants by their last name.
- Use the mute/unmute functionality appropriately. Try to keep the barking (of any pets) to a minimum.

- File all briefs, responses, replies, or sur-replies at least 24 hours prior to the hearing.
- Exchange any exhibits with opposing counsel at least 24 hours prior to the hearing.
- Work with counsel to sequentially number all exhibits (1…100) and send all exhibits to the court reporter 24 hours ahead of time to ensure that the court reporter has them all.
- Arrive to the hearings early! Please be sure to connect at least 3-5 minutes before the hearing. The judge appreciates litigants who are ready to go when the court is ready.

- Use visual aids, PowerPoint works very well in keeping everyone on key issues.
- Be aware that you are potentially being live-streamed to the world.
- Practice with the platform prior to the hearing, especially if you have a client/witness who has not used Zoom before.
- Be flexible, as things will come up that are unanticipated.

Q&A Session

SETTLING FOR MORE

Raising the Value of Mediation

Eric Oliver

"*My wife says I can't drink no more— Well, I sure ain't gonna drink no less*!"
– Seigel Schwall Blues Band

Mediation – to mediate— is generally defined as an effort to resolve differences by *working with* (italics are ours) conflicting parties**,** or to act as an intermediary or a guiding link between parties. To these definitions we propose adding one more: mediation is a singular opportunity to increase your client's advantage overall – including a favorable trial outcome if an immediate settlement is not reached. Mediation can be an additional step in the process of dispute resolution, *not* an "also ran" alternative. If your efforts at mediation bring a successful outcome – thereby precluding the expense of a trial—then**,** in the "traditional" sense, you've won before even starting. However, if your mediation does not result in immediate resolution, the efforts you have put into its preparation and delivery will in no way be wasted; in fact, they will have already put you far ahead of the opposition in later settlement talks or, if and when you do get to a trial.

Mediation as Opportunity

Whether official or unofficial, mandated by a judge**,** or voluntary, mediation is always an opportunity to advance your client's positions in multiple ways that are not readily apparent during the mediation process itself, but which can make a huge difference in the eventual resolution of their case. Just because you don't win an immediate settlement does not mean it had no value; you can still "win" in many ways as a result of the mediation process –*if* you approach it well.

We've noted over the years a range of attitudes toward the mediation process among trial lawyers – from the enthusiastic, to the openly hostile, to the all too commonly resigned "here we go again." The latter predisposition is particularly troublesome as it provides a handy excuse to forgo any kind of *serious* preparation which, unfortunately, will only result in leaving many of the advantages you could have gained from mediation still on the table when you leave. Not only can your case be undermined, it very likely also will be badly *damaged* if your inclination is just to "show up" – regardless of how long the mediation lasts –without more than a bare minimum of effort having been put into preparing for the process. You will have passed up a golden

opportunity to improve your client's position even in the event that you *don't* achieve a favorable settlement on the spot.

By choosing to use mediation as a *strategy* capable of producing multiple advantages for you and your client —rather than considering it some kind of dead end—you can immediately raise your expectations for what could come from the mediation as high as you are willing to put effort into the process. How to fulfill those expectations is what this article is aimed to help you achieve.

Mediation Decisions and Their Makers

According to Marc Galanter in *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (American Bar Association, 2004), the ABA estimates that fewer than 2% of federal cases filed, and less than 16% of state court cases filed, actually go to trial. While a portion of these cases are dismissed, "settlement" is the primary outcome for the rest of them. Yet many attorneys still question the value of investing much time, energy or resources in mediation. A few common (and misperceived) objections include: mediations with no resolution are a waste of resources; they are like fishing expeditions, i.e, a delaying tactic used by the opposition or, a deliberate attempt on their part to "smoke out" your case or just plain wear you down. Yet, experience tells us that if you put in *little to no effort* preparing for a mediation, you will almost always guarantee *no return* from such an opportunity, thereby also guaranteeing a self-fulfilling (and erroneous) prophecy. Whether the mediation is mandated or voluntary, a "garbage in" approach will usually produce a "garbage out" result – *against* your client's interests *and* at your client's expense. As long as you are going to be there, we suggest you come prepared in order to get the full value from the opportunity *and* from your client's investment.

Interestingly, a view of mediation as increasingly *significant* to the process of garnering favorable settlements has emerged alongside the more familiar "here we go again" position. Jeffrey Sterns suggests in his article *Is Negotiation Outside Mediation Pre-Historic?*[1] that a reliance on independent negotiation, i.e., private negotiation between attorneys on behalf of their clients, has faded due to the proliferation of mediation as the preferred settlement method. Stern offers a list of factors he sees that have helped to raise the perceived value of the mediation

[1] 2006 article, cited by American Society of Trial Consultants member Ed Schwartz

process for many lawyers. Two of these factors are the "Floor-Ceiling" scenario and the "Projected Weakness" perception issue.

In the "Floor-Ceiling" scenario, Stern suggests opposing parties have come to expect, and rely on, mediation as the first *serious* effort towards resolution of any case in litigation. Therefore, any independent negotiation is viewed as too risky because either precipitously raising the floor *or* setting the ceiling lowers the possibility of success. Framed that way, negotiating *outside* mediation not only is becoming a lost art, but is also a risk you don't want to run.

"Peacemakers" may be blessed, but in the contentious arena of trial law the person willing to make the first move toward reconciliation is likely to be viewed as a loser rather than a saint. Stern also points out that mediation brings parties to the first step all at the same time, therefore avoiding the threat of "Projected Weakness." However, there is still a potential pitfall in waiting until the start of mediation to begin serious thinking about resolving a case. Many trial lawyers are familiar with the harried feeling that comes from trying to prepare an adequate opening statement on a Sunday evening before a Monday morning court date. Just like an opening prepared too late, waiting too long to properly prepare your mediation positions and delivery will almost surely hurt the eventual resolution of your client's case by conceding ground you cannot regain.

Whether you are of the mindset that tends to deny the value of mediation, or believe that it is a method of default, one thing is certain: settlement outcomes, like verdicts, are *not* preordained. When it comes to the *value* of settlements in mediation, just like the *value* of jury verdicts, the case story delivered by the strongest presentation has the most power to prevail. It is the decision makers' perceptions of the facts that drive decisions, and in *every* venue it is the persuasively presented stories that drive perceptions.

In our experience, many accomplished and successful trial lawyers, who have confirmed through their own experience, the value of systematic planning for the delivery of a case story in order to lay a foundation for trial presentation planning – including taking advantage of focus group research –still retain an unfortunate blind spot regarding the value of investing the same kind of effort and resources when preparing for mediation. Yet, they all know that upwards of 95% of their client case stories will never be seen or heard by jurors. Instead, they will be decided by judges sitting behind a bench, at an arbitration hearing, or by the opposing parties in

conjunction with their lawyers at mediation. In far too many attorneys' minds, the hard won insights from focus groups or independent case presentation planning is considered strictly for use with a group of jurors at trial. When it comes to using the same carefully planned material to influence the decision makers that, nine times out of ten, they *actually will be* trying to influence and/or persuade, attorneys give little to no thought to the advantages that will most certainly be lost as a consequence of not planning, not preparing for and not delivering, their client's case story at mediation with the same caliber of effort as for a jury trial.

The real danger in acting from the mindset that requires full effort only when preparing to persuade jurors is revealed by what happens when the decision makers in mediation are deprived of the results of that level of preparation. Now, *neither* jurors *nor* legal professionals are supposed to be the final arbiters in mediation – the parties themselves are, with the aid of their attorneys – but for many lawyers treating "the parties themselves" as "decision makers" is a difficult departure from the "juror-centric" decision maker image most likely in the front of their minds. And those omnipresent jurors can dominate far too much of an attorney's mental landscape when planning a persuasive mediation presentation. However, there's a bit of a twist here – mediation decisions are *not* strictly in the hands of "the parties themselves," – they are also in the hands of the third party in the mix, the *mediator*.

Rehearsing for Success

By the very nature of litigation, trial attorneys tend to *rehearse* a mental and perceptual bias toward *outcome* and away from *process*. But, far more often than not, those habits, especially the ones that distort perceptions of the persuasive landscape at hand, will achieve *only* what is rehearsed, regardless of the best intentions. By concentrating too much on the *outcome* of mediation, an attorney may be led by habit to miss the advantages to be gained from focused efforts to influence the ongoing decision making process. In mediation, the embodiment of this process is the *mediator* who, for all intents and purposes, is a third advocate influencing the case, though not as a representative of the interests of a client, but as an advocate in the interests of gaining a settlement. The ongoing decision making process of the mediator will be a major determinant of just how much advantage can be gained during mediation especially when– or regardless of whether–you do *not* settle on the spot.

How so?

When it comes to *process*, no matter what "format" or "template" a particular mediator chooses to work from, nobody is immune to effective persuasion – nobody. Regardless of their

years of experience, their years of training, their professional acumen, or their particular approach to acting as a "guiding link between parties," mediators are driven by the same decision making rules as the rest of us. The only difference during the mediation process is that the mediator is the one who can have the major impact on its eventual outcome. Like a television producer, a film director or an editor of a newspaper, the mediator is the one making the choices of which way to go next at every step of the process. And the choices that ultimately count the most toward influencing everyone's perceptions during the *process* of mediation are the choices made, at any given moment, to emphasize, exclude, question, isolate, incorporate, reframe or empower, one part of a case story in relation to all the rest. However, despite the fact that it is the mediator who chooses which parts of the story are selected for focused attention, and which aren't, the attorneys present can strongly influence those choices – and their impact on everyone involved—through and, far beyond, the process of the mediation itself. The raw material of reality is perception and one secret to success is not to focus only on which parts of the story have been chosen for attention, but also on how – and *when* - they are described, envisioned and *perceived* during the mediation process, i.e., on how they are *delivered.*

How does one create a strong mediation presentation? The answer is simple: preparation, preparation, preparation. By preparing the case as if mediation were as important as a trial,[2] an attorney not only increases negotiating power but *also* completes vital groundwork for taking full advantage of any further steps in the resolution process in the event that an immediate settlement is not reached.

Wherever decisions are made, and regardless of who makes them, effective presentations always translate into significantly more favorable settlements. While it is true that there can be significant upfront costs associated with developing a strong case presentation, these costs are dwarfed by the potential for a favorable settlement amount *or,* when mediation doesn't produce an immediate resolution, the potential valuable advantages to be gained for the next step in the case. However, just as with trial, preparation for mediation should be just one part of the strategy. The client's case *story* must still be strongly *delivered* to the decision makers, directly or indirectly, depending on the style of mediation being used. A presentation delivered poorly can literally wipe out the entire value of the rest of your case preparation.

[2] Since, in nine out of ten times, it is.

Nobody is immune to the effects of interpersonal communication, regardless of whether the communication is delivered positively or negatively. Since perception of the facts – rather than some arbitrary "objective" version of them – rules the legal judgment process, including during mediation, then whoever is better able to manage the decision makers' perceptions of the facts in competing case stories will be the one more likely to reap the benefits of those efforts from *all* decision makers present, including the opposing party, who naturally will be resisting the process. However, it is the mediator trying to bridge gaps between opposing parties who will be most affected by *the way* the material is being discussed, omitted, put off, exaggerated in importance, or framed in helpful or unproductive ways.

Clotaire Rapaille, author of *The Culture Code*,[3] is a world renowned market researcher who specializes in the factors that drive selling and buying behavior. He is also the man who popularized the term "reptilian brain." He famously said – when asked what set him apart from the massive marketing departments of the many Fortune 500 corporations who had hired him – "They listen to what people *say*. I don't." Trial attorneys who have experience with well run focus groups and effective post-trial juror interviewing, know very well how dangerous it is just to take decision makers at their word when it comes to what they *say* is the most important piece of evidence, the most probative issue in the case, or the one thing that made them side for, or, against, the plaintiff or the defense.

Professional legal decision makers– judges, arbitrators, and mediators - have little inherent interest in the concerns of a particular party's conflict, and even the most extensive efforts an attorney might put into preparing and developing a case won't change that view. Influence happens during communication, but how compelling that influence is, and whether it will work favorably or not, depends almost entirely on how efforts to persuade are *received*, not on a show of conviction by the communicator, nor certainly on any inherent "probative" value of its content. It is always the decision makers' *perceptions* of the facts in the story that determine the level of influence on their leanings during the process. So, practicing the most effective means of managing perceptions in mediation is as important as it is in trial.

The brilliant author and student of the mind and brain, Daniel Kahneman, describes a mental habit of one of the fundamental thinking systems in the brain with the acronym

[3] Rapaille, Clotaire, The Culture Code: An Ingenious Way To Understand Why People Around the World Live and Buy as They Do, Jossey-Bass, San Francisco, CA, 2010

WYSIATI: "What you see is all there is." When a lawyer who knows better acts as if all that matters is whatever the opposing counsel or party *says* about their responses to his presentation of his case story or his arguments about it, to paraphrase Kahneman, they act as if "What they say is all there is." This is a dangerous fallacy that long standing habit drives too many lawyers to accept without a second thought in focus groups, in voir dire and in mediation, to the detriment of client interests.

When it comes to mediation, the influence of the mediator on the perceptions of either side's position can be profound, especially as they are likely to say one thing and do another in the overriding interest of achieving a resolution. It can be harmful to just take the mediator's word for what they *think* is, or is not, influencing them. The truth is, they don't know. Nobody knows. That's why Rapaille wisely doesn't listen to conscious, after the fact, interpretations of the influence someone's persuasive efforts are having – or not. When it comes to their legal decisions, when asked "why?" people either will lie, or occasionally tell the truth, i.e., "I really don't know".

We all often assume a much greater degree of conscious control over our mental processes than really exists. After all, if the opposing parties, their lawyers, and the "independent" mediator all possess total conscious control over all their reactions to any efforts to persuade them, no influence could ever occur. What could lead them to allow themselves to be influenced if they were capable of completely stopping it from the start? In the context of mediation reasonable minds *will* disagree, right up until they perceive no other alternative to agreeing. What would cause them to accommodate any conflicting interests, if they had the power to stay completely immune to the influence of any other position simply by willing it to be so?[4]

But of course, that's not the way it works. Influence and persuasion are not only possible, they are inevitable. The question then at the start of each and every mediation should be "are you ready to deliver the goods, or not?" The presentation of a client's case story can go a long way in engaging professional decision makers, opposing counsel and their clients and most often will, when approached properly and delivered well. That delivery must be designed, developed and presented with an eye to influencing the parts of each decision maker's mind that do more than

[4] Attributing the influence you have had on *their* thinking to a third party like the judge or a group of jurors party ("Well, you may fool a couple jurors into thinking..."), as if they – not the attorney – could be persuaded or "fooled" by your efforts is proof positive of that influence existing for that lawyer at that time. Otherwise, how would they know to worry about the same response in a third party at all?

the parts that only speculate out loud about what's actually going on between their ears and behind their eyes, once you sit back down.

Investing in Success

So, how can you "win" in mediation – even when you don't settle immediately—using a strong, well prepared presentation? A strong presentation automatically shifts the perceived settlement value your way in the mind of the opposition no matter what they *say* out loud. Just perceiving the extent of effort preparing such a presentation requires starts raising the bar. The persuasive impact of an effective presentation is not lost on the side that has to imagine—*during your delivery*— having to prepare a similarly persuasive counter. Development of their case story, along with the investment of time and resources necessary to counter your delivery, suddenly become part of their calculation. You've raised the bar on the perceived "cost" of pressing forward.

The confidence and cohesiveness of the "team" on the other side can be shaken by your mounting a smooth, professional presentation, especially when you bring along a fully integrated set of visual aids and introduce them seamlessly as you proceed. Having to try and match your level of persuasive delivery, with little to no preparation of their own beyond the usual "Sunday night opening" effort, can turn the other side away from questioning *you* to questioning *themselves*. And, when you do this, don't discount the favorable impact on the mediator during the rest of the process. You've raised the bar on perceived effort by your opponents to try their case.

Your own overall performance in bench conferences, motions hearings, discovery (written and in deposition), subsequent settlement discussions (if needed), subsequent case presentations including practice in front of a "serious "audience" like a focus group, and at trial, will all be enhanced by the work you've already invested. You can get focus group level input from the mediator, from the opposition "team," and from your own people as well. How well you are prepared to do so will determine just how much added value you will gain from your participation in mediation regardless of whether a settlement is immediately forthcoming or not. You've raised the bar on your own persuasive case story development *and* delivery.

A focus group prior to your mediation can offer a test scenario for defining the most persuasive storyline and for determining how to present evidence that is the most powerful, while

also showing the way to reframe weak case story points into strengths. Assuming that the group reactions are positive, attorneys can use the results of a focus group – if it is conducted properly—to cast doubt on an opponent's predictions of likely victory. However, that is the least of the potential benefits of weaving focus group material into your mediation presentations. A focus group can reveal how decision makers might go about assessing the potential value of the case. While there is no guarantee that the results of pre-trial research will mirror an actual jury verdict, it will still produce valuable information when analyzing case *values* for mediation. You *also* can get focus group level input from the mediator, from the clients you are opposing, as well as from your own people and from the opposition "team" too.

You can use the mediation presentation itself as a finely targeted *focus group* presentation in at least three ways.[5]

1. You also can use the mediator as, literally, a one person focus group during your presentation. The mediator's reactions to your story delivery – spoken, unspoken and, especially, implied—can reveal the positions of any of the other legal *professionals* who will possibly hear and see your work when, and if, you move beyond the mediation phase. In mediation, unlike in trial, the mediator not only must talk to you about their impressions of your story *as you deliver it*, but also must take immediate positions on it in order to *move the process along.* Therefore, taking into account which of your frames stick, which of your language choices are adopted, repeated, reframed or rejected, which of your mental or demonstrative images are referenced directly (or indirectly) in the mediator's input following your presentation, is all *very* valuable "grist for your mill." You've raised the bar on *the edge* you can achieve with the professionals involved, including the current mediator, in the future resolution of your client's case.

2. During the same mediation session, you also can consider the opposition "team" as focus group participants during your presentation. Their spoken, unspoken and implied reactions to your story delivery (and whether they want to or not, they *won't* be able to keep themselves from reacting) not only can offer valuable feedback about *potential* reactions from future decision makers, but also can identify the areas the other side perceives, for themselves, as strong points – or weak points—and especially, which parts of your story delivery come across as unpleasant surprises or wounds. This kind of feedback is invaluable. Because if it comes from an unfriendly

[5] If you are facing a mediator who does not agree to making presentations, you will want to rethink your choice of mediator.

decision maker's perspective, it not only helps you refine future work on your presentation plan, but also helps you target your planning for cross exams and discovery. Now, you've raised the bar on *the strength* of the next stage of your delivery.[6]

3. You can use your *own* reactions to your mediation presentation, along with those of your team members, as a kind of focus group as well. Just by noting the delimitative responses from yourself and your team while making your presentation in a critical – if not openly hostile – environment can help reveal which parts of your story delivery work well, work somewhat well, or fall flat. Finally, you've raised the bar on *the quality* of your own delivery.

Remember, when you dive in and use mediation as a focus group, the unedited, spontaneous responses from all present can include some of the most valuable feedback possible about a case story and its presentation. Nobody is immune to the effects of anchoring, or responses conditioned in the moment. And, nobody can fully hide the effect when they experience it, though many try to deny doing so afterward. Fortunately, these denials take place *after* you have already used the opportunity, "in the moment," to observe and record the actual reactions.

In most mediation sessions, direct exchanges between representatives of the parties, or the parties themselves, are not allowed. However, in mediations when exchanges are allowed, using the process as an opportunity to "conduct" a focus group can be done very directly. And, compared with the cost of a full scale focus group, the cost of using mediation in this way is, practically speaking, no cost at all.

At a mediation when direct exchanges are allowed, follow the basic steps of a well run focus group. Ask the right questions, ask even more of the right follow up questions, and listen. This task requires a fundamental shift from presenting and arguing to listening and following up. This may sound simple enough but, for most attorneys learning to do so won't happen overnight. It is very similar to the difference between doing 90% of the listening in voir dire instead of 90% of the talking. If you are a 90% listener in voir dire that is who you want to be in this type of

[6] While you do want to approach mediation with an "all guns blazing" position, what you learn there from reactions to your delivery, and from subsequent efforts in case development must be used to adapt, change and refine the package for your next presentation – at trial. It ought not to be just a longer version of the same presentation.

mediation. If you are a 90% talker in voir dire, chances are you will adopt a similar posture in mediation, in which case, you want to rethink your strategy in both situations.

Effective questions to ask are similar to effective questions asked in voir dire. First, identify the topics of concern, and then ask "How so?" or "Tell me more." For example, when advocating for the plaintiff in a car wreck case, and the defense attempts to minimize damages due to a pre-existing injury, you might ask "How, specifically, could a 10 year old injury affect the one this wreck caused today?" And, no matter what the defense says, your response should be "tell me more," "tell me more," "tell me more." Or, in a mediation in which you are the defense attorney and the plaintiff is claiming the warnings were inadequate, your questions should be "How so specifically?" *And*…. "tell me more," tell me more," "tell me more."

For example, in the case of a complex breach of contract going to mediation, there were seventy two depositions, a room full of documents and a daunting number of thorny side issues. Factually and legally there appeared to be a solid basis for each side's interpretation of the contract, the only difference being whether eight million dollars belonged to the plaintiff or to the defendant. When both sides stand on relatively equal footing as in this case example, the advantage usually will go to the defense. The plaintiff had to do *something* to gain an edge.

What did they do? They identified nine main topics, key story *frames*, and all relevant facts, exhibits and testimony were assigned to one of those frames, thereby giving particular *meaning within each story frame* to those facts, exhibits and testimony. Selected highlights from the depositions and documents were chosen to illustrate each frame. The plaintiff streamlined the information into a twenty minute PowerPoint presentation using nine (one for each frame) professionally designed demonstratives, five deposition excerpts and eleven exhibits with cull-out text boxes holding testimony excerpts. The frames: hierarchy, property, standards, commercial v. private commitments, breaking commitments, timelines, alternatives, costs, and consequences, all referred to the *human* elements the contract defined, i.e., people, places, property, rules, reliability, time, numbers and harms.

It came down to which side's interpretation of the contract was going to rule when it was time for each side to make their presentation. The defense typically began by running down a chronological rendition of events, using dated exhibits to move through their timeline. They did not address the specific *frames* the plaintiff's had previously set up; rather they focused only on

documents ("The evidence will show"). Their emphasis was on "words and dates on paper," thereby distancing themselves from any "real world" elements of the human narrative —people, places, property, rules, reliability, time, numbers and harms.

After their presentations, each side retired to separate rooms and the mediator began shuttling between them. Then, the "focus group" began. Both sides relied on the mediator to ask and answer questions; the plaintiff to plumb the opposition – nine times.

Question 1: "How does the defense refute our slide about the "Hierarchy?" (The "Hierarchy" in this story simply showed which companies held control over which others and over which subsidiaries.) Power and control are key factors when it comes to perceptions of who may be seen as ultimately responsible. Framed that way the mediator sees the common sense in the question delivers it to the defense. The mediator had not previously received an answer and so went back with the question and returned with a simple answer: "they don't refute the facts on the slide, but they see no relevance."

Question 1a: The plaintiff asked their *other* focus group "participant," the mediator, "What do you make of their answer?" His response: "The defense refuses to acknowledge the relevance because that weakens their position." The defense apparently had lost some credibility in the mediator's eyes.

Question 2: "How will you determine whose definition of property is correct?" The mediator responded with his own professional (and likely personal) criteria for defining property. This was very helpful as it was different from *either* the plaintiff's or the defense's criteria. Now, adjustments could be made by either side based on input from this de facto "focus group" to align more closely with the decision maker's view.

Question 3: "How will you decide whether the industry standards are the measuring stick for the defendant's conduct or — as the defendants are proposing – that industry standards are irrelevant; that the only thing that matters is a 'black and white' interpretation of the contract language?" Again, the mediator, acting in a participatory role, is likely to reveal positions of his "fellow participants" when offering his responses.

Question 4: "When you think about your own experiences with professional and/or private commitments, how would you prefer that contracts be interpreted? More like the defense version or more like the plaintiff version?" This question led the mediator to consider instead, how *jurors* would most likely evaluate the case. The mediator predicted that jurors would most likely interpret the contract the way they would want their own contract interpreted were they in the plaintiff's shoes—an assessment the defense in their turn in the "rotation," said they refused to believe. This prompted an exchange between the two sides (though the mediator reserved his opinion during the exchange) of plaintiff and defense conducting a *formal* joint focus group— an unexpected turn in *any* mediation—in order to see for themselves which side jurors would more likely identify with in the case. A joint focus group was professionally conducted (at a later date) and it did indeed confirm the mediator's original predictions—and the case settled. Although the joint focus group could have gone the other way and contradicted the mediator's prediction, the plaintiff assumed that the worst case scenario would be that they would go to trial, so *why not* do a focus group on the chance that the defense would "see the light." (This same mediator now occasionally recommends conducting joint focus groups when cases become stalled in mediation and the obstacle seems to be a debate over how jurors might react to certain key aspects of the case.)

Although the formal focus group was conducted at a later date, the following questions outline the rest of the ways the plaintiff made use of mediation as a de facto focus group. We leave it to you to consider how the potential responses to these framing questions could help strengthen the case story structure and eventual delivery to decision makers, in or out of mediation. Remember, these questions are posed to the mediator who is shuttling his negotiation efforts between the parties in separate rooms, thereby becoming an active participant in questions *and* responses.

Question 5: "Do you see 'broken commitments,' and if so, how?"

Question 6: "Does it make a difference to you if we revise our timeline of events to be more consistent with the defense's chronological approach, or is it more persuasive to you as is?" Asking a mediator to "rule" on the *persuasive*, not the supposedly *probative* effect, of a visual presentation tool in the case story delivery turns the attention to process and individual reactions, and away from a focus on just numbers and outcomes, which generally lie outside the human narrative.

Question 7: “Do we reinforce the defense by ruling out all their alternative interpretations, or do we need to address each one?” Again, learning how any kind of decision making professional sees the story’s strengths or weaknesses is a great help going forward.

Question 8: “How can we improve the credibility of our cost calculation?” This is where the plaintiff’s case was most vulnerable because the plaintiff’s expert already had changed the calculations in his report twice. The first time after the defense had pointed out an error and, the second time when a loss claim had been dropped. So, feedback from the mediator on this point was especially important to the plaintiff lawyers because they had considered settling for less *just because* of this perceived credibility weakness.

Question 9: “How can we bolster the consequences of the harms to the plaintiff without our efforts coming across as ploys for sympathy?” Asking, in essence, for coaching tips on presentation of the damages case form an active decision maker in real time.

Feedback from the mediator on each of the nine frames was invaluable to the plaintiff. They had been able to educate the mediator on their case story by going through the slides and asking the questions, and then were able to incorporate the mediator’s feedback into revisions in their presentation for the joint focus group. The defense had been expecting the plaintiff to give the same presentation at the focus group as they had at mediation and were caught completely off guard. The more input sought after and received, the more your story delivery can evolve.

Even if a formal “no exchanges” presentation is insisted on at the start of the mediation there are still opportunities to engage in some form of debriefing, if only by carefully observing what’s happening on the other side of the table. Or, if the other side is sequestered in another room, you can press the mediator into service for your cause by sending them back to the opposition with specific follow up questions – though be sure to insist on a couple of follow ups after your initial questions of “How so?” “What else?” and, “Tell me more.” These kinds of questions will most likely get substantive answers if you are clear, concise and indicate that you are committed to the process. After all, if the other side refuses to answer your simple questions, *they* start to appear less and less like participants “in good faith.”

In another example of a mediation where presentations took place, but direct exchange between the parties was not permitted, the participants themselves proved to be highly valuable as a "focus group."

A medical neglect claim centered on a post-surgical follow up, i.e., getting the patient seen, as having been delayed until it was far too late to do any good. There were three medical professional defendants seated along one side of the conference table as the plaintiff attorney had his paralegal set up a portable screen at the far end. From all indications from the mediator this was a little unusual. Recognizing this, the plaintiff lawyer framed his departure from the expected routine by saying, "I've never really done this kind of thing before. But, (eyeing the opposition counsel and the mediator in turn) because I really think there is a serious chance for settling this case here today, I'm just going to lay our cards right out on the table."

He proceeded to deliver an abbreviated version of the current opening for the trial, *with* demonstrative aids and excerpts of primarily *defense* witness statements displayed next to pictures of their faces – the very same faces sitting across the table. He only cut things short as he arrived at the details of the damages because several interesting and valuable responses were forthcoming.

This presentation produced definite input from the other professional "focus group" participant, the mediator. This mediator (and also an attorney, which is often the case) had a long history of working with medical neglect cases, usually on the side of the doctors and the hospitals involved. The lawyer representing the plaintiff in the room had actually worked against him in a few prior cases representing injured patients of those same hospitals and doctors. He had noted a strong attitude this mediator had expressed consistently over that time: he typically placed a low – or even no - value on future medical procedures claimed as necessary by an injured plaintiff.

This case presentation dealt with just such a claimed harm and, in fact, it was a major feature of harms being claimed. Remarkably, in the first private discussion with him after the presentations, the mediator indicated he had already informed the defense that – contrary to his long standing habit – he was viewing this "future" harm as one of the most *compelling* features of the plaintiff's case. His validation confirmed the power of the language choices, demonstrative aids and sequencing of the delivery of that part of the plaintiff's case.

In particular, a slide had been produced that showed the interior anatomy of the plaintiff's affected limb. This anatomic illustration was reproduced across the chart nine times, in two horizontal rows. Each very red, mostly muscle-focused image was labeled with a date and a name for the procedure that had been tried in order to help relieve the plaintiff's pain and restore the function of his arm. The first eight images had the international "NO" symbol of a red circle with a diagonal slash through it superimposed over them. But the last one had a big question mark with the name of the procedure below: "Amputation." The doctors treating the plaintiff had agreed that the best chance for relief of pain or possibly even a slightly improved level of function was replacing his flesh and blood arm with plastic and metal.

In later trial testimony, each operation on this plaintiff would be exhaustively examined from every aspect of advisability and effectiveness. But, on this chart, the line of anatomical images leading, finally, to amputation invited viewers to build a chain of inevitability in their own minds about the need for, or *value* of, the last surgery. While the mediator never directly referenced the slide itself, his reactions and comments certainly did.

During the plaintiff presentation, the medical defendants at the table each revealed, because they were each unsuccessful at concealing, which parts of the story being delivered they strongly agreed with (to the point of smugly crossing arms and nodding vigorously) and, which points they strongly disagreed with (self righteous snorts and eye rolling) and perhaps most importantly, which points they were most fearful of, or reluctant about (and overwhelmed with a need to check their Blackberrys). With no words at all, they helped the plaintiff attorney refine his presentation strategy, sharpen his cross examinations, identify the need for further discovery, and hone his case story for an eventual trial.

One defendant, a religious man by reliable accounts, raised his hands and pressed his palms together during one section of the case story. The topic was this medical professional's obligation to confirm any dangerous condition simply by *seeing* his patient, or at least, having some other medical professional take a look. Reading a bit of unspoken remorse in the defendant's unthinking gesture, the plaintiff attorney retooled his cross of the doctor for trial suggesting (but not directly declaring) *remorse* as an appropriate response to the defendant's repeated refusals to look at his own patient. When the time came for that stage of cross in trial, the doctor cried on the stand which the jurors apparently took as a significant reaction because they subsequently assigned that doctor the lion's share of fault.

In another mediation concerning a car wreck case, the mediator started out by saying "After reviewing both sides' written statements, we have to discuss the facts before we get to the numbers, because both sides are miles apart in terms of what this case is really all about. The defense statement does not address the plaintiff's position and vice versa." This mediator actually *requested* presentations from both sides to address specific topics in the case. For example, the effect of speed on impact and injury, an MRI that doesn't show brain injury, the effect of the natural aging process on injury, and other alternative causes of the claimed harms. Because they were not pivotal to the plaintiff's story, these topics had all been downplayed in their written mediation statement and, naturally, they *were* the core of the defense story. The plaintiff took the gist of the mediator's request to be "show me how you would reframe these defenses so I know how to negotiate each point."

The plaintiff took advantage of the opportunity to arm the mediator with their best story including consistent visual aids to back up the key points. In this way, the mediator and all those in the room had a compelling context within which to perceive and understand the specific topics. Perception being reality, managing both words and images significantly boosts influence during the process. The visuals showed that it was the *angle* of impact, more than the speed, that caused the injury; that the timeline, not an MRI (MRI's don't image this kind of injury) linked the injury to the impact; and that the path to estimating influence of the aging process on the injury was based on the post-impact history. All of these facts rendered any alternative causes of harm null and void.

As the presentation reframing each defense proceeded, the mediator visibly nodded in rhythmic confirmation with the pace of the plaintiff's oral delivery. The defendants visibly tensed during the presentation, confirming the areas where they felt most vulnerable. The content had been structured well in writing but it was the actual presentation that gave life to the story and how it would be perceived, gave negotiation tools to the mediator, and confirmed the defendant's weaknesses. Relying on a written statement alone could never have achieved this level of persuasion. After successful completion of the mediation, the mediator – who teaches CLE's on mediation – asked permission to use the plaintiff's visual presentation as an example in upcoming seminars.

Rehearsing for Failure

What if the other side opposes presentations in a mediation claiming they are beyond being influenced about their position on their case? Regardless of what posture they assume, what they are really saying is that they know that if they watch your presentation, there's a chance they could be influenced by you as to how *they* value the case and thus subsequently affect their chances in negotiating successfully for their side. This is what makes doing a presentation an *essential* part of a successful mediation process. The fact that during effective presentations influence really *does* happen is usually what drives the other side to try to *prevent* you from presenting. When the other side insists on no presentations, on no consideration of what the case is about, or even on no consideration of the value of the case, that is all the more reason that you should *insist* on delivering one. Doing so is essential to persuading your opponent to move from their self protected tunnel vision toward *receiving* the different perspectives you have presented.

The same holds true for influencing a mediator. They are capable of reacting much like all those judges you know who oppose voir dire conducted by attorneys—not only because of the judge's inherent bias, but because they have been forced to sit through so many badly managed voir dire examinations run by attorneys. Many mediators have the same knee jerk negative reaction to the suggestion of attorney presentations simply because they've had to sit through so many *bad* ones, e.g., the plaintiff in a personal injury case just pushing "play" on their day-in-the-life video of their catastrophically injured client.

Often, the resistance to presentations is couched as being beneath the dignity of the participants ("we don't need to sit through a dog and pony show"). This response to the use of presentations suggests that all the professionals present are somehow immune to their effects. But, in fact, the opposite is true. Even if they may have been immune to poorly delivered presentations ("dog and pony shows") in the past, mediators and attorneys are just as susceptible to being strongly influenced by a presentation delivered well – however unwilling they may be to admit or, even recognize, that fact. Regardless of background or education we all make these decisions in the same way: We *reconstruct* the case story through *our own* filters based on *our own* perceptions of both the facts and the law and, on how the story has been delivered to us.

"We are agreeable to mediating with plaintiffs prior to May 10 but do not think formal mediation is necessary. We do not believe it would be productive to have a neutral party tell us what our case is about or how it should be valued;

we understand what the case is about and how it should be valued*.*

Unfortunately, we do not believe that your clients have that same understanding."

– an excerpt from correspondence from opposing counsel prior to mediation

Even if the other side's position is not expressed as crassly as in the above excerpt, the sentiment often can be undeniably present. If there is to be no presentation, then the risk for opposing counsel of actually being persuaded is eliminated, allowing them to sink deeper into their entrenched – and conveniently untested - position. Contrary to the spirit of our adversarial system, trying to avoid or run from potentially being influenced by fighting a presentation while, at the same time, loudly declaring "they've got nothing" starts to sound very much like someone who, as Shakespeare wrote, "doth protest too much."

These days, a large number of mediators choose to identify their style or approach as being aligned with one of two opposing poles: "facilitative" or "evaluative." These terms have been adopted to identify a mediator prone either to encourage *negotiation* or, to act like mediation is simply an arena for *arbitration*. The methods of approach differ in that a "facilitating" mediator asks more questions of each side, and an "evaluating" mediator makes more declarations to each side. With a mediator of the first type, the parties are *asked* "What *can* happen?" With a mediator of the second type, the parties are *told* what *will* happen.

When it comes to persuasion and influence, there are at least two immutable, though somewhat confounding, truths. The first is that, for all of us, *perception is reality*. But, the second is that, also for all of us, *things are not always what they seem.* It would *seem,* for example, that the more controlled, declarative and "evaluative" mediator would be likely to oppose formal presentations. And though that is accurate, perversely, the more controlled, declarative and evaluative the situation, the more susceptible to influence the mediator and all the participants are from even a minimally well developed presentation—simply *because* the opportunities for influence to occur are so sharply curtailed in that environment. Just *one* potent, well delivered reframe, can have a hugely disproportionate effect on an "evaluative" mediator than five so-so reframes offered to a "facilitative" mediator.

And, let's not forget their *own* reluctance most lawyers feel about preparing for and delivering a strong, well crafted (including strong visual support), well rehearsed mediation

presentation. Unfortunately, there are usually just too many other things calling for attention on an attorney's plate, that mediation – the perennial "also-ran" of dispute resolution competition—tends to get pushed to "the bottom rung of the ladder." That means, just in terms of the odds, that nine times out of ten, his client's interests are sitting on that bottom rung too.

Avoiding making reasonable efforts to resolve a case at mediation isn't the only mistake attorneys risk making when they discount the value of mediation. Imagine for a moment, the way all parties involved in a *perfunctory* approach to mediation act – and interact. They walk in and immediately agree that any formal presentations are certainly beneath the "professional" (safely untested) level of discourse they want, i.e., the level that leaves their precious preconceptions unchallenged. As a result, *neither* attorney is tasked to present anything at all, much less a compelling story. The opposing sides are not required to consider anyone else's story or, much less any value put forward. Without presentations in the mediation process, strong movement from either side on differing perceptions of facts, events, applicable law or values of harms is suppressed.

In this kind of mediation environment, the mediator, whether of the "evaluating" school or the "facilitating," having a simple set of guidelines, all in neat black and white numbers, supplemented by unreliable juror verdict averages – everyone is more likely to be pushed farther apart on the way to either a poor resolution, or none at all. It would be difficult to construct a format more likely to discourage rapport while also avoiding useful grounds for serious discussion. Many decision making professionals tend to think of such stripped down, dollar focused mediation sessions as more in line with a "real world" approach to case valuation and the resolution process. In fact, this approach is a severely impoverished reflection of the "real world," more so than most of these decision makers (attorneys, adjustors, etc.) would ever willingly admit – or even be able to recognize.

When an attorney simply throws down a number and continues to stand on that number instead of engaging, there is little to none of their client's *actual* ("real world ") case story under consideration, i.e., the story behind the facts of the case. Nor is it being delivered with the best efforts of the professional advocate they hired. As a consequence, their case story remains undelivered and *unheard* by the opposing parties and their representatives. The "reality" has been relinquished to the self-serving presumptions of the other side who "already know what this is about and what it's worth.

Instead of offering the other side the broadest opening for appreciating and understanding the many aspects of your positions, a narrative devoid of its human elements will only invite a flat wall of resistance, not the give-and-take of engagement or compromise. This is true more often than not because, regardless of what parts of the story actually manage to surface, their delivery will not be *within* the best case story context that could have been developed. With no compelling story to engage the decision makers on the opposing side, there is no emotional basis, no level of engagement (as with that of a well delivered story) from which their decisions *could* arise. There is nothing "on the table" that requires them to detach from their *own* preconceived presumptions about the case, its legitimacy or value. What's worse, without an opportunity to deliver a compelling case story, any strong challenges to what the other side sees as the accurate and reasonable value of the case has no perceptual foundation. Additionally, in their eyes, any visceral reactions on your part to strong – though unjustified—resistance on their part, will drive a wedge in any rapport with them (if there even *is* any at this point) serving only to make matters worse, not better when trying to move forward. This kind of mediation scenario makes for stubborn bargaining, which in turn, encourages "chest bumping" over respect.

Without *both* sides presenting even a simple sketch of their case story, the brain's ability to decide and resolve that case story is handicapped. All cases are established, maintained and eventually resolved in the minds of decision makers as human, face-to-face narratives, regardless of the legal claims being disputed. The reconstruction of every legal case story as an "embodied narrative" (that's what the framing and decision making experts call it) is the reality most legal training (and practice) does not take into account.

Legal decision making research has recognized, since the early 1970's, that the "translation" of each case by each decision maker into their own *private case story* is an essential step in producing legal judgments. The perceived reality of any legal decision maker comes from constructing their own private *embodied narrative* of a case story. Nobody is immune to this inner narrative process. Nobody can avoid it. Nobody is above it. Accommodating this basic fact of legal life and adjusting your persuasive efforts to take advantage of it, is what we are promoting here. Refusals to attend and consider presentations during the mediation process and continuing to stand on numbers alone, is nothing more than assuming, without question, that the case will be resolved through "chest bumping."

And even when cases *are* resolved in mediation this way, the "chest bump" approach leads to one of only two possible types of settlement outcomes:

1. A comprehensive and worthwhile resolution will be undermined by the "after taste" produced by unnecessary disengagement and antagonism.

2. An inadequate, unreasonable, and even unfair, settlement will be recorded.

The "chest bumping" approach to mediation which actively – sometimes aggressively – opposes using presentations, or even discussing, a case story, is analogous to how the current health care industry's priorities seem to be misaligned. Their approach to healing primarily puts patients and their families last. People familiar with modern medical business know that a hospital is set up, first and foremost, in the interests of its private ownership entity. Next comes its allegiance to health care providers, i.e., the insurance folks who refer to money paid out for patient medical care as their "loss." Next on the list, the institution's administrative needs and wants; after that come the requirements and requests of the hands on health care workers. The very last priority of our current medical care system are the needs, concerns and wishes of patients and their families.

Showing up for a mediation and opting only to go through the motions, still committed to standing on a particular number, almost *guarantees* that neither side will ever seriously challenge their *own* views—views that are by nature self-serving— of what "we know about the value of the case." Choosing not to prepare or deliver a presentation is choosing not to allow your client's position to be revealed to its best advantage in order to ensure the most favorable outcome possible. Cases get resolved either way, but the numbers only, "chest bump" approach will never leave a lawyer with a sense of certainty that all was actually done that could have been done to gain the most advantageous resolution for their client.

Interestingly, the justification often cited for sticking with the numbers first, and numbers only, approach are the jury verdicts "in these kinds of cases" published in verdict research. Believing that juror responses to a particular case presentation on a particular day, can be accurately and reliably quantified and predicted, ranks among the worst examples of the misuse of legal research data. Just because this data is so commonly used, "don't make it so." It's a fictional endorsement of its value in resolving individual matters. The truth is, jurors can be and

often are, the least predictable and most challenging element in the whole legal decision making system—by design they are the ultimate "wild cards."

Setting the Stage for Mediation

There is another way to think about the process of mediation as you approach it in each case. The potential advantages especially accrue for plaintiff attorneys who choose to rethink old attitudes. Imagine rethinking the approach to mediation from a viewpoint of "I'll try and get this case settled... maybe," to a viewpoint of "I wonder just how many gains we can make, whether or not we resolve this case today."

Would you choose to do some, none or lots of preparation? Would you hold out for an oral presentation, or make no presentation at all? If you choose an oral presentation, would you prepare and present visual demonstratives with it, or not? How would you seek out a mediator? How much thought would you give to location and facilities and their possible influence on the proceedings? How would the list of participants be set up? Would you choose to send your presentation materials out ahead of time? How would you decide whether to do so or not? How would you determine how much time to invest? How would you determine the most worthwhile goals for the process? What would be included in your presentation, e.g., focus group video excerpts, PowerPoint programs, witness video clips, etc. How often would you rehearse your presentation and who would have critical input on your performance?

These, are just some of the variables that can affect the relative value of resolution in mediation, either in terms of a settlement on the spot and/or gains in other areas beyond immediate resolution. In order to give you, your client and their case story, the best shot at the best outcome, you can –and should –determine beforehand, all the relevant needs and potentials of your mediation presentation and negotiation.

And speaking of the case story, it really helps if you have one. Focus groups, well run and conducted before mediation, can also reveal the best *frames* and *anchors* which will put your case across *as a story* instead of just as a "case." Compare in your mind the difference between an opening statement that is a dry inventory of facts, i.e., "the evidence will show," and an opening statement that is a compelling human narrative that engages one and all—girded by the facts. In any conflict there are many factors to investigate and many threads to develop in order to craft the

strongest story package for the facts –and for the law. Likewise, there are many resources to draw on for a more comprehensive review of them all.[7]

Here are four essential factors to developing and delivering a strong case story package for the mediation process:

1. *Point of View.* A strong case story needs a central character that remains central throughout. For example, The American Association for Justice, through its senior members and researchers Greg Cusimano and David Wenner, have long recommended that, as a default position for plaintiff personal injury cases, case stories are stronger and achieve better results when delivered with the *defendant* "on stage" as the central character through whom the rest of the characters are presented *and* perceived. A singular point of view helps to quickly invite decision makers to build their own private stories of each case, reliably sorting out the main and minor *characters*, as well as the main and minor *actions* undertaken by those characters, and with one consistent player at the center.

2. *Active Ingredient.* What is the primary force driving the events of the story? This is similar to asking what is the "motive" driving the choices and actions of the "characters" in the story. Once efforts to develop a story *as a story* have revealed the strongest motive, the work is only half done because the driving force behind choices and events is best delivered to the other side *indirectly.* A lawyer simply standing up in front of decision makers and accusing the other side of, say, being "greedy," is a lawyer satisfied with only "bumping chests" with the other side. Although it takes some work to devise the strongest, yet indirect way to get the active ingredient of a case across to the other side, experience will show that it is worth the effort.

3. *Language and Images.* These help to build the *anchors* of your story that decision makers can condition themselves to employ. An effective delivery of a case story relies on carefully thought out and carefully presented, language, i.e., a vocabulary list or "glossary" of the story is essential to creating a string of mental images, a "storyboard" of your story's key "chapters." As anchor points, the mutually supportive phrases and images provide the cues for the story each *individual* listener builds from your presentation.

[7] Oliver, Ibid. Also, see Perdue, Jim, Winning With Stories: Using the Narrative to Persuade in Trials, Speeches & Lectures, State Bar of Texas, Houston, TX, 2006, and Ball, David, Theater Tips and Strategies for Jury Trials, NITA, Louisville, CO, 2003 for a start.

4. *Story Sequence*. Presenting a story in a sequence, designed (and preferably already tested in focus groups) to invite decision makers to build the most engaging and memorable narrative they can, may be the most influential factor of all. Keep in mind that sequence is not always about chronology. Think about starting a medical neglect story at the point of injury, then jumping back to the original medical circumstances and covering the risks, the proper procedures and what the outcome is when the rules are followed and procedures are done correctly, thus delivering the patient from the hazards risked under those circumstances. Imagine the difference between the internal narratives decision makers would build from listening to that kind of sequence as opposed to listening to a more chronological sequence in which the patient gets sick or hurt, seeks help from medical care professionals and, despite their many persistent and heroic efforts on the patient's behalf, despite all the care, something goes wrong (medical professionals are "only human" after all). Where you start, and the steps you follow through to the end of the story – delivered consistently in every recitation of the story – can be quite persuasive for decision makers in, or out, of court.

No matter how you choose to develop the sequence of your case story, or which factors you choose to use in that process, when you walk into mediation you want to be ready to deliver *that* story and reference *that* story, and revive *that* story at each stage of the process for the mediator *and* for the parties who will ultimately decide the matter. Doing so ensures that all the other benefits of the efforts you've put into the mediation process will continue to accrue.

Getting Points Seen

Put the argument into a concrete shape, into an image,
some hard phrase, round and solid as a ball, which they can see, and handle,
and carry home with them, and the cause is half won."

–Ralph Waldo Emerson

A visual story is a powerful story. It uses visual aids to invite decision makers to create their own mental imagery linked to your key word and image anchor points and, is consistently presented in the best possible story sequence. These kinds of *anchor effects* can be successfully achieved by way of a carefully delivered sequence of words or phrases, tied to select well crafted images, thereby managing and guiding the perceptions of decision makers along the path you would like their private case stories to follow. Facts and law do not decide cases, *perception* of facts and law do. Imagine for a moment, walking into your next mediation with a powerful case

story, fully supported by well considered and well prepared visuals, ready to catch your opponent—and perhaps the mediator too—a bit off guard. Preparing for mediation with a *storyboard* of key visual images to invite *anchoring effects* for the key phrases in the delivery of your case story, is a long way from being resigned to the self defeating "here we go again" approach.

Consider the format of your written mediation statements. Many attorneys follow a mediation statement format that has been predefined by their firm for use in every case, even when the sequence or topics may not be persuasive for, or even relevant to, the case at hand. For example, the typical topic sequence for the plaintiff is: Introduction, Liability, Personal Life and Activities, Injuries and Treatment Damages and Conclusion. Knowing that the most persuasive story is the one which will suggest the most productive topics and sequence to use, avoid encouraging construction of case stories you don't want embedded in the decision makers' minds. The written part of your preparation is an opportunity to engage the mediator on a higher level by also including visual support to illustrate the case story. Embedding visual anchors in a written narrative that is sent to the mediator and/or other side ahead of time can help you start the process on a completely different footing. By "embedding" we mean using small, full color versions of your storyboard visual aids within the text at the proper points, not indexed and tabbed on the back end. Your written presentation with its supporting visuals can capture the readers' attention before mediation even begins.

We live in the age of "screens," television screens, desktop and laptop screens, iPad screens and cell phone screens and they all predispose us to being moved by *potent* visuals. As well, since we live in such a visually saturated media culture, decision makers likely could feel distinctly deprived if they aren't provided images to help them turn a phrase into an *anchor*. So, knowing how powerful the visual image is in our culture, what would keep you from preparing and showing images you most want to be used by decision makers?

Preparing to deliver—both to show and to tell—a powerful case story is crucial. Not only must the delivery of the case story's strengths be as persuasive as possible, the story must also be presented in such a way as to most effectively undermine the other side's story strengths, and to undermine, if not negate, their rebuttals. And in the legal arena, there is no other presentation device or technique so consistently underappreciated, underutilized or undervalued than the tool of the visual demonstrative aid, i.e., "putting the argument into a concrete shape." Most lawyers

tend to think of demonstrative aids as first, a *cost* to them and their clients, and second, as typically linked only to trials. As a result, attorneys generally do not commit the time, energy and resources necessary to create strong visual aids until the case has moved to the trial phase. But, by then, they've often squandered the time they could have had to do the important job of influencing decision makers' visual perceptions.

Recently, the plaintiff's bar has become very interested in the human capacity for *self conditioning*. Conditioned responses are also the result of what frequently turns up in CLE events and journal articles under the heading "Anchoring Effects." The most common anchors under discussion are numbers used to condition damage amounts for decision makers and how smaller order numbers, often linked to "hard" damages can needlessly serve to drive down non-economic numbers.[8] *Anchors* are conditioned responses to certain cues, so for example, a low cost number shown early in evidence for a "hard" number, let's say the high four-figure cost of a funeral can become associated with a response by the decision maker (who is other than consciously using that number as a "ceiling" to use when considering values of all the harms) for how low the *overall* damage picture should be. Perceived that way, additional amounts will tend to "look better" to that person when they are smaller and reduced, not larger or expanded.

The cues that we all use to condition our responses have two basic parts. The first is typically a *word* or a *phrase* from the "vocabulary" of a particular story; the second is a *mental image* also linked to that story. A properly delivered *mental image* accompanying a set phrase, encourages the decision maker to "stick" the anchor in their *own* mind for their response. *Mental imagery* is the part most attorneys have not been trained to value, never mind use, to their client's best advantage. However, the properly delivered mental image and phrase encourages the decision maker to stick the anchor in their mind as if projected there on an internal "screen".

If a plaintiff's attorney drops the phrase "hard working family" into their story delivery without providing visual cues tied to that phrase, they are less able to manage what mental images – if any – may come up in a decision maker's mind. Some decision makers will be cued, as was intended, to bring up certain responses; others will be cued to do the opposite. Instead of conditioning a response of high value to the phrase and images about well being among that family, the response elicited could be that of suspicion of lawyers trying to make verbal appeals

[8] Most plaintiff attorneys look for substantial "hard" or economic damages to lead their discussion of harms and loss values under the mistaken impression they will be used as the lawyers wish they will be used: as a floor, not a ceiling. Anchors rarely work that way, unless you help them.

to sympathy during legal proceedings. Though both responses can be elicited by conditioning, neither response is automatic. With carefully delivered cues in a case story, influencing *perceptions* can influence *associations*. Doubling your potential impact by tying words to images in your delivery just makes good sense.

The good news is that almost anyone will accept the "invitation" to link the anchored phrases and images in their heads *as long as* they are delivered well within the overall context of the case *as a* story. Managing mental images takes a bit more thought, preparation and skill than just asking the spouse of the injured party to give you a copy of the last family portrait to blow up for viewing during mediation, or than pushing "play" on a DVD settlement brochure. If the combined phrase and image are going to serve as a constructive anchor point in the case story, there is some artfulness required when trying to find – and deliver –the images that will have the most persuasive effect on decision makers' responses to the phrase "close, hard working family."

Vivid visual demonstratives of different areas of life enjoyed by the "close, hard working family," before the events leading to the lawsuit, can help when sequenced carefully throughout your presentation. The image of family members gathered "closely" and engaged in highly valued, "traditional" activities, even just hinted at with visual aids – photos or snippets of family "home movies" —and depicted as a storyboard of several events over time, is a fine start to introducing *mental imagery* into your presentation. But keep in mind, the response you are looking for, the link you want your decision makers to make, is a sense of the *loss* of that aspect of well being; of its having been *taken away* or *removed* by the acts of the defendant. For example, showing one member of the family as literally "missing" from the "before" images of "family well being," by leaving an empty silhouette, or showing an insert of how, or where, that person has been –perhaps permanently--separated from, or relegated to a position outside of the family whole, invites the desired responses you had intended decision makers to associate with the imagery. Think then, if they are also hearing——while the imagery is in front of them— something like "you can still hear the voices, and the sounds of [the event, activity] just around the corner, as the sun slowly heads toward the horizon. But, sadly, the strongest voice, the loudest laugh, has been taken away, because the person with that voice can be found, virtually imprisoned indoors every day, unwillingly absent from their spot in the family; instead dealing with the treatment, the physical therapy, or the debilitating effects of medication, while trying to manage the immobilizing pain the defendant's actions left him with after..."

A growing trend in the field of mediation preparation has been the use of professionally created video presentations. Whether from depositions, witness interviews, "day in the life" clips or choice statements from focus group participants, video can be a powerful medium to use when delivering a client's story. This is the ideal opportunity to get feedback on your witnesses "straight from the horse's mouth." The mediator, opposing counsel and their client are usually very forthcoming with critiques of a witness's credibility, demeanor, contribution and overall effectiveness. However, when it comes to presenting witnesses on video in mediation (or focus groups) less *really is* more. From your chosen witness's performance carefully select only the very best (or worst) parts for a presentation of no more than five minutes overall. You will be surprised by the wealth of impressions and responses to brief, but targeted, displays like this, even from experts testifying on very complex subjects.

During mediation, showing short video excerpts from the group process and discussions of a focus group already conducted for the case can create leverage with opposing counsel and a mediator, both of whom otherwise would only have the jury verdict averages in "similar" cases to rely on. While focus group results are not predictive of trial verdicts, they are a strong part of litigation research that can offset the results of jury verdict reports—reports which are often inaccurate predictors of future individual case results. Also, showing video clips of focus group participant discussions at mediation is often more persuasive than presenting the numeric results the focus group produced. The mediator and opposing party can judge the participants' credibility and engagement for themselves as they hear individual versions of the case story (they thought they knew all about) reframed by "real life" decision makers.

These videos can also be interlaced with PowerPoint images thereby creating powerful multi-modal presentations. Again, imagine how the negotiation dynamic will shift when one side enters the room with a polished and well organized presentation of their story, while the other side has only a legal pad with several "killer" facts written on it. Using videos and visuals also demonstrates a commitment to the most effective delivery of your client's case that cannot be ignored.

What Can Happen?

Many attorneys fear "giving their case away" at mediation; they see mediation as only arming the opposition for trial. Let's look at the odds. If you are going to play the cards you have, there is an 84% chance that the opportunity to do so will be in mediation *first*. And, if you don't

play your cards in mediation, you will likely never get an opportunity to play them *at all*, thus forfeiting the opportunity to reap their potential benefits. Second, mediation offers an opportunity to learn where you stand with your best story delivery *to date*. As pointed out earlier, the lessons available from using mediation as a focus group enable you to improve your story presentation, to better strengthen your position in the event of an actual trial. Lastly, if you *don't* show and tell the whole story at mediation, the feedback you get will be unreliable. Remember, decisions are based on the sum of the whole, not on isolated parts. You need to provide the mediator and the other side with your *whole* story, in its most current form, in order for them *to provide you* with any feedback of real *value.*[9]

One caveat here. If you do end up at trial, you never want to go with precisely the same story presentation you used in mediation. Always revise your story frames, edit your storyboard demonstratives, and perhaps alter your story sequence in order to raise your story presentation to the next level. There is never just one way to tell the story and never just one demonstrative aid to illustrate the facts about a single case. If the other side is smart, they will do the same.

The cost of litigation is often steep. But, so is the cost of the outcome of a poorly managed settlement. When plaintiffs settle cases prior to trial – as most do – the attorney needs to be able to provide their clients with the reassurance that all that reasonably could be done *has* been done to assure that a proper value was reached in the resolution of their case. More and more plaintiff attorneys are discovering what a key role a proper presentation in mediation plays in achieving that end.

Consider these comments from a team of two attorneys who had been dealing with lengthy litigation in a particular variety of "insurance bad faith" case regarding the many post sale coverage products offered to car buyers. They made the choice to invest the time and resources to craft the best possible mediation presentation. Here's what they said afterward:

> "After spending seven and a half years in litigation, which included two appeals, significant motion practice and literally thousands of documents, [we were able to] organize, sequence and present the evidence in a way that made it speak volumes for our cause. I am absolutely convinced that our opposing counsels were blown away by our

[9] This principle applies to focus group work as well. "Piecemeal" research gets broken results.

presentation...After seven and a half years without a single meaningful offer we were successful resolving our case just two days after [our presentation].” And,
“We got our case simplified to the point it could be presented in just a few, simple slides. After cross examining the opposing parties’ insurance expert using [our presentation] sequencing, and when the other side saw our demonstrative aids...we were able to settle the case”.

The two attorneys had utilized the story sequence they had carefully crafted for mediation as a storyline to follow in their cross exam of the other side’s expert, all while referencing visual aids to help in conditioning decision maker’s responses. They were able to consistently turn *the other side’s* best witness into a witness consistently supporting perceptions of the plaintiff’s side. A couple of days later, the demonstrative aids they had created to serve as visual anchors for the key phrases in their storyline *erased* over seven years of stiff opposition to basically *any* resolution of that case, never mind a worthwhile one!

It can be challenging adding new techniques to your presentation repertoire, like story sequencing, anchoring and reframing, but waiting for trial to try all of it for the first time can be suicidal. When it comes to developing new skills in persuasion, the experience of delivering the story *as a story*, even in written form, is invaluable. For example, preparing a presentation for mediation in a medical neglect case, plaintiff’s counsel was having a hard time delivering one part of the story sequence while keeping the viewpoint of his story locked on the defendant doctor. The solution he employed was to “create” another set of characters. By carefully presenting the *proper* choices and actions in the case story context as they *should* have been executed under the circumstances of the defendant’s negligent acts at the time by *reasonable medical professionals* acting according to proper standards.

The key persuasive task was to establish and reinforce the anchor – through a mental image – of a hypothetical *reasonable surgeon* who did things the right way *before* introducing the negligent choices and acts of the defendant. Part of the value of this tack in story sequencing is not only to create the sharpest contrast possible between the *right* way and the *wrong* way of doing things by a professional, but also to help decision makers focus on the story from the point of view of the professional (the doctor) and *not* the patient**.** And definitely ***not*** from the point of view of an injured patient with yet *another* of those notorious personal injury lawsuits. After a successful resolution, the attorney took the written part of his presentation around to several

individuals in order to test his efforts at sequencing the defendant and hypothetical *reasonable surgeons*. Here's what he had to say:

"I polled everyone I let read the submission. Without exception, everyone's comments were only about [defendant doctor] and what he did/did not do when asked what their initial impressions and thoughts were about the case. Nothing about [plaintiff] until I brought her up, and then the comments were that she should get everything she asked for. It was almost as if the point were assumed.

Interestingly, a couple of people even commented that it was clear how the "good surgeons" do this particular procedure. I couldn't believe it when I heard it. They were talking about the hypothetical surgeon like s/he was a real person that I had identified by name.[10] I know these techniques work even better when done verbally, but this was a good first step...I had time to stop and think about what I was trying to do since I was writing it."

In the case of a workplace brain injury caused by severe neglect of safety training and oversight by a residential home construction concern run by a charity, the plaintiff attorney had been laughed out of the office and off the phone several times by the team representing the well known charity and their insurers. Much like those lawyers who wrote how well "*...we understand what the case is about and how it should be valued*," the attorneys on the other side had been "spared" any truly persuasive experiences that might compete with their position and further, that might well take root in the minds of decision makers. That is, until they got to the plaintiff attorney's mediation presentation.

There, they discovered a storyline that was sequenced in a unique way, where the verbal and visual aid anchors of the key story points were delivered according to what they – the defense – had indicated they look at as *their* stronger points, finishing, naturally with their oft repeated point, "Nobody is going to award a huge verdict against this charity, especially in the town where it's based!" The plaintiff's case story sequence began with the least of the defense's "strong points," reframing each with a demonstrative aid and a word or phrase to help decision makers anchor, or condition themselves to that point inside the overall story narrative.

[10] Actually, the hypothetical surgeon was identified by name – "reasonable surgeons" – and by the mental images marshaled to reinforce that perception. Anchoring effects work.

The final anchor was a series of demonstrative aids, all with headings (in red typeface) with the key phrase "*What kind of 'Charity' does/says/withholds/keeps/does not...?"* Within eight hours, and with the help of that brand new perspective on the case – the case that the other side had insisted they "understood so well" – the value of settlement had risen so far above the small number it had been stagnant at for years that, the plaintiff's attorney told her client it was a settlement value they simply could not refuse.

Because so few cases get to trial, getting experience practicing more persuasive influence skills in your delivery can be a real challenge. Many attorneys will prepare a presentation for a focus group, but don't realize that preparing and presenting for mediation offers an invaluable addition to getting that practice in without waiting for trials. Not only is the aim of adding persuasive presentations to your mediations "settling for more, not less," adding them almost *always* ensures that more, not less, *will be* the outcome.

Trial Lawyer's Perspective: Practical Tips to Present a Strong Case

KBH LAW

Forsyth County News
1h ·

The court has since started working with the Department of Public Health to move forward with contact tracing, further testing and directing employees to self-quarantine.

FORSYTHNEWS.COM

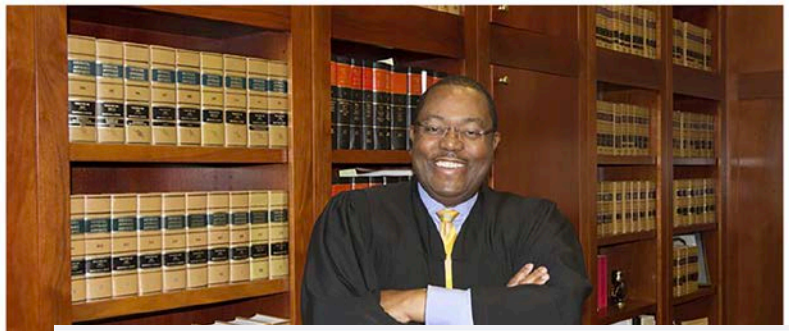
3 Forsyth County Courthouse employees test positive for coronavirus

The Covington News

CON

News | Living | Sports | Opinion | Obituaries | Magazines | NIE | Calendar | Classifieds | E-Edition

Judge Horace Johnson dies



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Gwinnett County court employee tests positive for COVID-19, office closed

Published July 13 | Coronavirus in Georgia | FOX 5 Atlanta

GWINNETT COUNTY, Ga. - The Gwinnett County Clerk of Court's office has been closed after officials say a deputy clerk tested positive for COVID-19.

According to the Clerk's of Court, the employee notified management that they had tested positive for the novel coronavirus on the night of June 10.

Officials say the employee was a deputy clerk and "typically interacts with the public."

A Trial Lawyer's Perspective: Practical Tips to Present a Strong Case

- How to make the Virtual Record
- How to Preserve the Record
- What Technology Works Best
- Introducing Evidence Virtually
- Interactive Demonstration

How to make a Virtual Record

Court Reporter

How to Preserve the Record

Court Reporter

What Technology Works Best

Zoom
WebEx
Teleconference

Introducing Evidence Virtually

Zoom
WebEx
Teleconference

KBH LAW

Interactive Demonstration

anyone who has had a Zoom hearing recently; how (if at all) did you address any communication with the client DURING the hearing? none at all? email? some kind of text app? saying this because during a regular hearing we sometimes have clients who like to write notes on a piece of paper as the trial progresses, which of course is impossible to do over Zoom.

KBH LAW

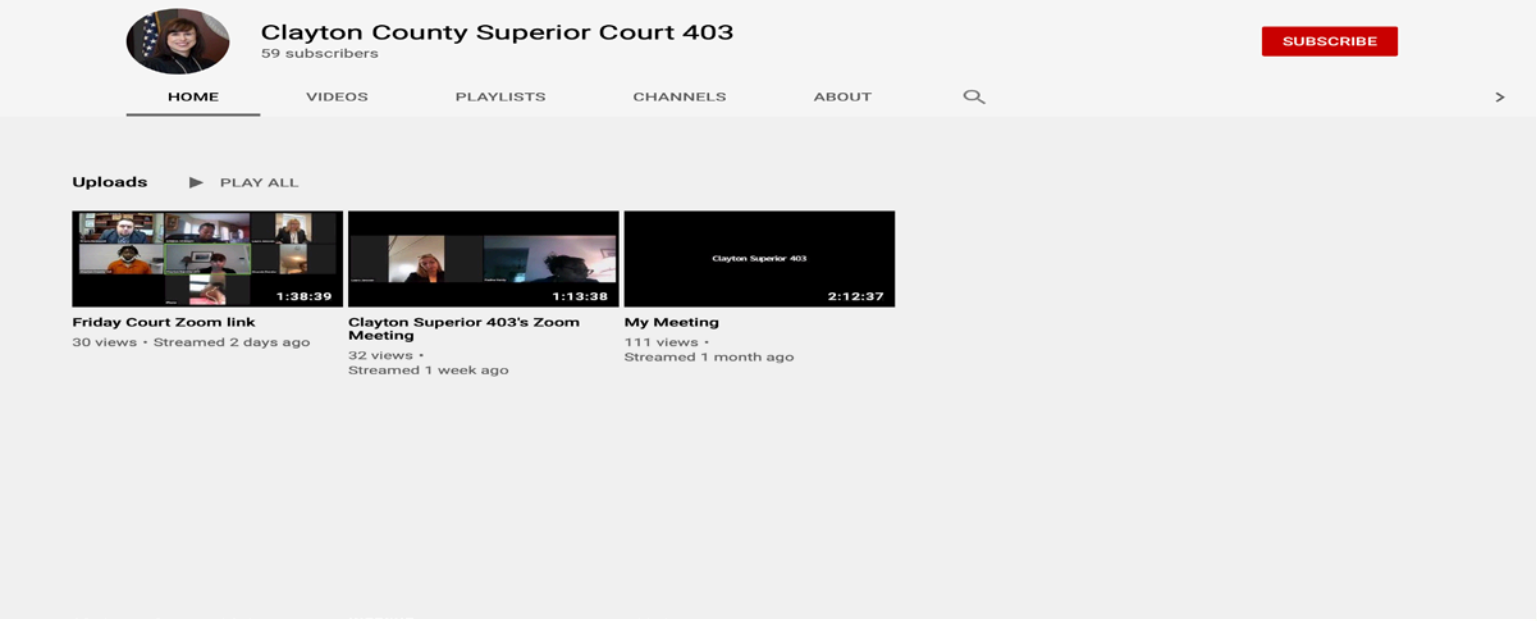
Client Prep

Happy Friday! A lady on the calendar call called in sitting in the bathtub with a shower cap on. The judge told her to get out of the tub. She started to stand up and the judge had to scream "turn off your camera!"

KBH LAW

Preserving the Record

- Georgia Uniform Superior Court Rule re: Recordings
- https://www.cobbsuperiorcourtclerk.com/wp-content/uploads/2018/02/Superior-Court-Uniform-Rules-2017.pdf



Fulton County Superior Court
EFILEDQW
Date: 8/27/2020 5:13 PM
Cathelene Robinson, Clerk

FAMILY 2 JUDGE

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
FAMILY COURT DIVISION

[redacted]	§	**CIVIL ACTION FILE NO.:**
Petitioner	§	[redacted]
And	§	
[redacted]**TEL**	§	
Defendant	§	

ORDER REQUIRING VIDEO CONFERENCE HEARINGS

Due to the Order Declaring Judicial Emergency entered March 13, 2020, by the Chief Judge of Fulton County Superior Court and the Order Declaring Statewide Judicial Emergency entered March 14, 2020 by the Chief Justice of Supreme Court of Georgia, pursuant to O.C.G.A §38-3-61, all non-emergency hearings shall be conducted via video - conference during the COVID -19 emergency period if possible.

All Status Conferences and hearing shall be conducted by video conference. The Court has set up video conferencing through Zoom. *Zoom Basic Personal Meeting* is available free of charge and can be downloaded onto your computer at https://zoom.us/pricing or *Zoom Cloud Meeting App* is available for free in the Google play store of Iphone. You can also dial into the conference by calling 1 646 876 9923. Or you join the meeting at **https://zoom.us/j/863 4961 8330**

The Court will conduct all Status Conferences by video conferencing through *Zoom*. The Litigation Manager has scheduled your hearing according to your originally scheduled hearing time at **1:15PM** on **September 02, 2020**. It is imperative that you call or video in at the time set forth above. If the Court has not joined the meeting when you call in, please stay on the line and you will be joined with the Court as soon as the previous conference is over. NOTE TIME CHANGE TO 1:15 PM

The meeting ID for your meeting is **https://zoom.us/j/ 863 4961 8330**.

IF THE OPPOSING PARTY IS PRO SE, THE MOVING PARTY OR PETITIONER MUST IMMEDIATELY SERVE THIS ORDER TO THE PRO SE PARTY VIA EMAIL.

This Order supersedes your previously filed Order to Attend Status Conference or other hearing notice.

So Ordered 27th day of August, 2020.

Honorable Craig L. Schwall, Sr.
Fulton County Superior Court, Family Division
Atlanta Judicial Circuit

KBH LAW

Correspondence from Kelli Hooper regarding Zoom hearing tomorrow

Kelli Hooper <kelli@kbhooper.com>

Thu 7/9/2020 10:55 AM

To: [redacted]

1. [redacted]

This email serves as confirmation of our Zoom hearing with Judge Edwards which is scheduled for tomorrow at 10:00 am.

The Zoom set up is different than a typical hearing. At this point, most of us have used the software for a number of things, but I want to reiterate some tips to make sure that things go smoothly.

Recommendations

1. Mute your phone, and mute all sounds from all other applications (email notifications, chat messaging, etc.).

2. Avoid using a mobile device if possible. Although tablets (iPads) and smartphones can be used, they are very limited, and the performance is inferior.

3. Avoid using battery power only (laptops, etc.). Plug into a good power source while in a Zoom meeting.

4. Avoid using an open microphone and speakers, such as those that are built-into laptops or a webcams. Using a good quality headset (headphones with mic) will often help ensure you can be heard, and can hear others with maximum quality.

5. Avoid noisy and echoing locations. Use of a headset will improve audio quality when this is unavoidable.

6. Avoid distracting real or virtual backgrounds. Suitable example: ZoomGrey01.jpg

7. Avoid poor camera positioning (if possible). Try to frame yourself so you take up most the screen, at eye level.

8. Avoid using WiFi if possible. Connection via a hard-wire Ethernet cable will always be faster and more reliable than WiFi. If you must use WiFi, make sure you're in close range.

9. Avoid running any unnecessary applications besides Zoom, to conserve your computer's processing power and networking.