PUBLICATIONS

Show, don't tell, in mediation

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Most lawyers are well aware of the old adage "show, don't tell" when it comes to writing briefs and motions. This writing technique discourages telling the reader what to think and, instead, enables the reader to experience the story through actions, words, senses and feelings – rather than through the author's summary description. For example, stating in a brief that "the defendant was alone and drunk when he left the bar" ***tells*** the judge (or whoever is reading the brief) the defendant was alone and drunk. To ***show*** the judge that the defendant was alone and drunk, more specificity is required: "The defendant is a slight man, weighing no more than 125 pounds. He came to The Place to Be Bar from an office party and sat at the bar, by himself, for about an hour before the bar closed. The bartender testified that he served the defendant four martinis while he was at the bar and noticed he was unsteady on his feet when he walked out. The bartender asked for his keys and told him he should not drive. Defendant ignored him and staggered out of the bar."

OK, but what does this have to do with mediation? The same type of technique can be used effectively in mediation, but often it is not. When required to prepare a mediation statement to be shared with the other side, attorneys frequently provide bare-bone facts and analysis, rather than use the mediation statement as a tool to persuade and/or educate an opponent. Use the facts gleaned in discovery to paint a picture from your client's perspective and allow the reader to draw an image in his or her own mind that leads to the conclusion you want them to reach. Of course, this is easier to do when mediation is scheduled after the close of discovery.

Show, don't tell, in mediation

This technique is not limited to words alone. Photographs, timelines and PowerPoint presentations can be used as tools to ***show*** rather than ***tell*** during the mediation. Photos (usually from Facebook and other public social media platforms) showing people engaging in activities that they insist they can no longer do in light of their physical limitations (think horseback riding, skiing, bowling, etc.) have been particularly effective during early mediation of personal injury and disability cases. How about showing pictures of a husband smoking a cigarette when his wife insists that he was a non-smoker and, therefore, claims he did not make any misrepresentations on his life insurance application?

And, don't underestimate the impact a PowerPoint presentation can have during a mediation. The first time I saw a PowerPoint presentation used in mediation was in a case involving dozens of depositions and tens of thousands of documents. By using charts and graphs juxtaposed with statements from some of the important documents and deposition testimony, the plaintiff ***showed*** the conflicting testimony among several of the defendant's witnesses on key issues and its magnitude. This was much more effective than simply stating, "There are numerous conflicts in the other side's testimony on important issues."

Keep in mind, however, that employing the "show, don't tell" technique does not mean inflame, exaggerate, belittle or embellish – in mediation or any court proceeding.