

The Master Mediator

It's Not a Video Recording, Part III: Sharing and Vindicating Mediation Memories

BY ROBERT A. CREO

Over the two previous issues, *Master Mediator* columnist Robert Creo has discussed how the brain forms memory ("Memory is Not a Video Recording," 31 Alternatives 51 (April 2013)), and how memory plays in the mediation room. See "It's Not a Video Recording, Part II: Mediation and Memory" 31 Alternatives 69 (May 2013). The April article at Page 53 contains a 20-entry glossary of key terms and concepts about brain areas, and the processes that take place in forming memory. This month, he continues with the importance of sharing and vindicating participants' memories while the mediator avoids the trap of becoming the "Memory Umpire."



All parties should submit a table/chart with their chronology of events. The format is not more than four or five columns, and seven rows that fit onto one side of one page. This contains the facts.

There should be a separate table that addresses the elements of the case (liability, comparative negligence, causation, responsibility of other defendants, and damages) with only one element or factor on each row.

There should not be dates on this second chart. This is the macro approach, or the theory of the case "in chunks." (As described in last month's article, people store information in memory in "chunks", rather than bits; the chunk is the largest meaningful unit that a person recognizes.)

The author is a Pittsburgh attorney-neutral who is co-founder of the Master Mediator Institute, which conducts courses on negotiation behavior that focus on neuroscience and the study of decision making. He is author of "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is a member of this newsletter's editorial board, and the CPR Institute's Panels of Distinguished Neutrals.

In complex cases, such as business or contract disputes, a separate chart can be developed for each element of the case with the key phrases of contract language quoted. It is not necessary to have citations in the charts to the pages of the primary documents, since these already are provided to the parties, and it will harm the chunking process of memory.

The charts are excerpts, such as what is intended to be placed on a PowerPoint slide when used properly, and are not authoritative sources in themselves. The charts can be kept in the open and used throughout the mediation day.

CREDIBILITY ENHANCEMENT

One of my mediator tenets is not to take notes and to commit as much to memory as possible before the session from the preliminary telephone interview and written submissions.

Reading things repeatedly is not the best method for me. What works instead is reducing the data to short phrases tied to a date, event or person, then recording this in a table or chart.

I create a chronological chart with the key dates and events in what I now know the scientists call chunks by placing the information in rows and columns. I am conscious of not putting more than seven items or rows on a page. I try not to use more than five columns or category headings. I use large fonts, and emphasis such as italics and bolding, as appropriate.

In complex cases, I will have a separate table of expert names and conclusions. If there are many fact witnesses then these will also be listed in a table format with brief notations.

I then attempt to commit as much to memory, especially dates, as possible. Creating the table myself on the word processor and moving rows and columns about helps me encode the



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information. Reading aloud and then reciting from memory helps me with retrieval.

Access for retrieval is usually triggered by the cues from others at the mediation session, including key words. Whenever possible, I attempt to review the charts and tables the few evenings just before the case since the sleep process is essential for consolidation and storage information.

When counsel is talking, I am engaged in the presentation and if they make a mistake in a date or fact I interrupt to correct it. This is done without the submissions or charts before me since they are in my closed binder. I politely stop them and say that my recollection from the documents was, for example, that X happened on Monday and not Tuesday, or that my understanding was that the amount of the medical bill lien was a little more than \$228,000.

I believe this enhances my credibility since it shows I am prepared and, most importantly, that I am engaged in the details of the narrative. After all, these narratives are the life of human beings, and the outcome of the case

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ADR Skills

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may have tremendous implications for people for the rest of their lives.

Some mediators have dispensed with opening statements by the advocates and instead recite the respective narratives of each party from their mastery of the facts from their own preparation. Although many advocates find this to be effective, I prefer to let the participants speak for themselves. This begins the process of recognition and empowerment, and supports the engagement and reflection underpinning self-determination.

I also avoid the risk of imprecise language tainting my narration. The risk to the perceptions of my neutrality is minimized since any of my own narration might be interpreted as tilting in favor of one of the participants or parties. I am not diminishing the role of the counsel by framing the theory of the case in my own words so early in the process.

MEMORY AS DECISION PILLARS

Core memories, especially those with emotional content, are not simply “vented” and set aside: They are the platform for how we decide.

Many mediators share their own personal stories and memories. I am in favor of this provided it does not make the mediator the center of attention, and that the mediator remembrances are intended to be empathetic or to illustrate a key point.

There is no question that small talk and sharing of experiences builds connection and bonding. The communications must be authentic and shared as humans, and not given in a clinical or detached manner.

This dialogue and the building of a community of beliefs and connections is not detrimental to the concept of mediator impartiality. Mediation is not an evidentiary-based process with procedures and protocols of the courtroom or arbitration process. A mediator

having genuine concern about the welfare of participants is a strength of mediation, and justifies the term Alternative Dispute Resolution.

THE MEDIATOR AS MEMORY UMPIRE

During my arbitrator training, my mentor advised me never to act as a referee to test my memory against that of the advocates.

Telling Tales

The challenge: Getting mediation stories straight.

The obstacle: Facts are not absolute in the mediation room, because there usually isn't proof. Fallible memories rule.

The answer: The mediator and the parties have gathered to find a meeting of the minds. Among the proven techniques is small talk.

This problem usually arises in the context of the witness cross examination when one advocate challenges the factual assumption made in a question. A debate ensues about what the witness had said in earlier testimony. Obviously, if a formal stenographic record was being made, the court reporter could read back the testimony.

In my earlier years as an arbitrator, I tape recorded the hearing. Advocates asked me to find portions of the tape to play them back. I politely declined, mostly from fear the tape recorder or its human operator—me!—had a malfunction. If so, the parties might lose confidence in my ability to conduct the hearing. So I always ducked the issue, and said I would listen to it when I prepared the

opinion and that we were not going to argue about it now.

Being the arbitrator, this always worked.

Many years ago I abandoned the oral taping to just take notes. If it arises now, I still decline to review my notes and rule that the objecting advocate can address the matter on re-direct if necessary.

The same rule applies to mediation sessions. I do not engage as a referee between advocates or participants to resolve “he said—she said” issues during the course of the process. I do not challenge the memory of either the proponent or the opponent of the recollection. It is a no-win situation because if I side with one advocate it is unlikely to convince the other participant that they were wrong and that the two of us were right. This risks weakening my own credibility with one or more of the participants.

ENGAGING THE PAST

Recounting a story may reinforce the narrative and result in participants fortifying their positions rather than lose face by acknowledging they may be wrong on the facts.

In cases involving more than economic damages, however, it may be important to provide an opportunity for the injured claimant, the terminated employee, the aggrieved family member or business partner an opportunity to recount a prior event or experience. Mediators must wisely choose when to delve into a detailed account of the past, especially when it involves traumatic events or incidents involving betrayal or other interpersonal conflict.

Although the mediation theory and commentators often refer to this as venting, I do not agree with the traditional perspectives that its prime function is for a person to let off steam. On the contrary, retelling the tale may actually reinforce emotions and convictions rather than dissipating them.

The idea of getting emotion out of the way so reason can take hold is not scientifically valid. Decisions are holistic and include an emotional component. See, e.g., Robert A. Creo, “A Pie Chart Tool to Resolve Multi-party, Multi-Issue Conflicts,” 18 *Alternatives* 89 (May 2000).

My goal in hearing a memory of trauma or a deeply personal experience is to engage with the human being telling the tale in an authentic

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manner. I want a personal connection so I can better understand them and also react within the bounds of my own humanity. If it is a story that may be part of the evidence of a case, I want everyone in the room to hear, understand and act consistently with the values and interests of the person telling the story.

If a resolution of the case is unable to be reached that respects this "I remember" value, then we explore whether the litigation system will consider and address it. If the answer is no, then we must consider the personal impact of ending the litigation while exploring other ways to recognize and address the principles or values.

If there are no other viable routes, then I ask the person to consider if they are keeping

the litigation alive with the false hope that it will ameliorate the harm associated with the memory. I also ask whether a negative outcome for them in the litigation will exacerbate the situation and make the memory even more haunting.

There are cases where a person wants a jury to confirm a personal narrative, and ratify that the person was in the right and the other parties were wrong. This is what participants often call "Justice." I ask them if the jury decides the opposite—that is, accepts a contrary version of events which places blame squarely on the participant—if they will change their own beliefs and accept the adjudicated fact as being "the Truth."

It is a win-win query for the mediator.

If the answer is "no," and the person will stick with his or her own story for the rest of his or her life, then the need for a jury verdict is irrelevant to the memory. If the answer is "yes," then the focus shifts to the risk and consequences of the negative outcome. If it is devastating on a personal level, then whatever economic difference separates the parties is unlikely to be worth the impact of failure.

* * *

With some foresight and thought, advocates and mediators can communicate during mediation in a manner that respects the limitations of memory. Facts are there but not absolute because proof rarely happens in mediation. Findings and Truth and Justice can remain in the beholder's mind, as a resolution in mediation shapes each person's memories in a subjective manner. Always recall that mediation is an alternative process because it addresses needs that are often unable to be satisfied in adversary proceedings. ■

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ADR Technology

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years. That trend accelerated during the financial downturn. Susskind reports that many general counsel have faced 30%–50% reductions in their legal budgets, while legal and compliance work has doubled in terms of legal spend. See Sue Reisinger, "LegalVIEW Data Shows Litigation Up, Legal Spend Down," *Corporate Counsel* (April 25, 2013)(available at <http://bit.ly/16tXabq>).

Since 200 corporations buy 80% of legal services, it doesn't take pressure from very many clients to put pressure on the industry. And GCs are working together through the Association of Corporate Counsel's Value Challenge (see www.acc.com/valuechallenge) and other forums.

They are also aided by predictive analytics crunching big data sets to forecast expected expenditures on a matter with various staffing options. TyMetrix (see tymetrix.com), LexisNexis CounselLink Insight (www.lexisnexis.com/counselink), and Mitratech (www.mitratech.com) already have

commercialized that service and others will follow.

The more-for-less challenge not only applies to large companies with in-house legal teams, but also to small companies that have had difficulty hiring counsel and individuals who have seen public legal aid monies dry up.

Susskind laments that only the very rich and the very poor have access to the legal system at a time when a record number of law graduates go without jobs.

LEGAL SERVICES' LIBERALIZATION

The liberalization of who can provide legal services and information to the underserved 90% of the population is a Susskind megatrend. His views are certainly colored by his jurisdiction, the United Kingdom.

In England, "reserved" legal business—work only lawyers can do—is narrower than what constitutes the "unauthorized practice of law" in the U.S. U.K. non-lawyers can own and run legal businesses and make investments in law firms.

There already is a publicly traded law firm in Australia, which used capital from a financing round to buy a British personal injury firm. Other firms are expected to list their stocks in the United Kingdom soon. Susskind also sees the reentry of Big Four accounting firms more than a decade after 1,500-lawyer Andersen Legal went down in the unrelated Enron scandal.

While it's easy to dismiss this as a European phenomenon, the ABA Commission on Ethics 20/20 has been studying the definition of the practice of law and unbundling of legal services for a decade, and has made some relatively minor adjustments. Susskind is convinced that within 10 years, "after intense agonizing and various changes of direction, most major jurisdictions in the West ... will have liberalized in the manner of England."

We'll see. What we know now is that LegalZoom.com Inc., RocketLawyer Inc., AOL Inc.'s TechCrunch, and a variety of websites provide online forms that pro se litigants are already using in large numbers. Court help centers and walk-in clinics everywhere are filled.

During a ReInvent Law conference in
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