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# Frame Your Arguments for Mediation

By Dr. Ken Broda-Bahm:


You're working your way through discovery. Your arguments and themes for trial are taking shape. By the time you're in front of the jury, you'll know what to say. But first there's a mediation. Now you need to refashion your persuasive appeals for a different purpose. Your mediator is not a judge or jury, but is instead functioning in some ways as a predictive filter of what a future potential fact-finder is likely to do. While the argument to the judge or jury is on your *merits*, the argument to your mediator is on both your merits as well as your *prospects*. In that way, the mediation joins the two goals during discovery: case assessment and advocacy. To the mediator, you are *advocating* for a more favorable *assessment*. And that makes the mediation setting different from either traditional advocacy or traditional case assessment.

In this hybrid persuasive setting, litigators need to retool their mindset and their arguments for the purpose of framing their trial prospects in the best possible way. It requires more than just bringing out all the arguments you plan to make at trial. Instead, advocates have the opportunity to draw upon their experience with and knowledge of judge and jury decision making, along with focus group or mock trial results, in order to highlight those prospects as brightly as possible. In this post, I'll share some common themes and questions that are particularly important at the mediation stage rather than the trial stage.

In most cases, you are not going to want to share all your strategies or your mock trial results with the other side. But you should want to leverage those strategies and results in order to achieve

your best posture with the mediator. I believe there are 10 general questions that can help you do that. In answer to each of these 10 questions, answers can be fashioned that are designed to give the mediator a more favorable view of your prospects for trial, thus helping to create more pressure on the other side and a better ultimate settlement. Using a running example of a medical malpractice defense in a jury trial, here are the 10 themes:

**1. Where Will Jurors Focus?**

Not all issues are equal. Based on what we know about juror attention generally, or have learned in the specific context of this case, we can expect some issues to matter more than others.

For example: *While the plaintiffs will be able to point out specific gaps in documentation, the defendant hospital will be able to present a comprehensive and compelling picture of everything that was done to protect, monitor and care for the plaintiff. In the context of that broad picture, jurors probably will not expect perfection.*

**2. What Presumptions Will Jurors Hold and Apply?**

Jurors don't arrive as blank slates, and even if they try to follow the court's instructions to set aside prior knowledge and attitudes, they cannot set aside their current ways of viewing the world.

For example: *Medical negligence can be a more difficult claim to prove in trial than many other types of claims. This is, in part because jurors want to give medical professionals the benefit of the doubt based on their training and experience. Nationwide, medical malpractice defendants win upwards of 80-90 percent of the cases that proceed to trial.*

**3. What Judgments Will Jurors Trust?**

When it is a matter of judgment rather than fact, jurors will decide which judgments, and whose judgments, they trust.

For example: *Jurors could place most of the actions in this case into the category of a judgment call. Whether to use this particular test, for example, clearly falls within the category of a judgment call, and juries are most likely to find liability in cases of clear error and least likely to find liability when it is a matter of judgment (because they are, appropriately, less comfortable substituting their own judgment for that of a medical professional).*

**4. What Alternatives Will Jurors Entertain?**

It is typical for jurors to try to mentally undo a bad outcome in order to think about how it could have been avoided. Determining which counterfactual "what if" alternative they'll

choose, and how they'll imagine the consequences, helps to tell you how they'll decide on responsibility.

For example: *In reconstructing their own view of what should have happened in the plaintiff's medical care, jurors will expect clear answers to three questions: What was the right intervention? When should it have been taken? And what are the chances it would have worked at that time? To the extent that clear answers to all three questions are elusive, jurors will perceive an unmet burden of proof, or they will perceive an unfortunate inevitability to the plaintiff's death that will drain motivation away from a liability verdict or a high damages award.*

**5. What Will Jurors Do with Doubts and Gaps?**

The story presented in trial is never complete and never certain. Whether the gaps in facts or proof are caused by time limits or rules of evidence, or whether they are genuine unknowns, jurors will probably do something with those doubts.

For example: *Even if jurors do get past the question of what alternate interventions would have helped, they are still likely to use any remaining uncertainty in order to discount the amount of damages that they award. For example, research from CU psychologist Dr. Edie Greene demonstrates that in scenarios when either causation or liability or both are uncertain, juries finding for the plaintiffs anyway will award less in damages than they otherwise would have (Greene & Bornstien, 2003, Determining Damages, APA Press)*.

**6. Will Jurors be Mad or Sad?**

The research shows that sadness is less motivating than anger, and a juror who looks at the case story as an unfortunate incident is less motivated to award high damages than the juror who sees it as a reckless an irresponsible choice.

For example: *The rarity of the condition and unpredictability of the factors leading to a fatal heart attack in an otherwise healthy young man, makes it more likely that jurors will place the events in the "sadness/stuff happens" frame of reference, rather than the "anger/punishment" frame of mind that justifies large damages.*

**7. What Role Will Sympathy Play?**

Cases generally proceed from some kind of unfortunate event, and jurors are likely to have some sort of feelings toward the victim, or to some extent, for the defendant. But the role to be played by sympathy isn't always the same.

For example: *This is a sympathetic plaintiff to be sure, and sympathy will be compelling for some jurors. For a greater number of jurors, however, an appeal to sympathy is more likely to backfire. The rare nature of the event will make it relatively harder for jurors to see themselves or a loved one*

*as a potential victim in these circumstances (based on the Reptile approach) and will make it harder for them to identify with the plaintiffs.*

**8. Who Will the Most Credible Actors and Witnesses Be?**

For jurors, the trial is a search for who to believe. In addition to assessing the witnesses, they'll also look broadly at the character of each to the parties and decide who is more likely to be favorable, trustworthy, and responsible.

For example: *Due to the perception of greater expertise and training, doctors are more likely to be held responsible rather than nurses. In this case, there is no clear mistake by a doctor that the plaintiffs can point to, and there is the real chance that a jury will think the nurses followed orders and did all they could with what they knew and could not have predicted this result.*

**9. How Will Jurors Distribute Responsibility?**

Sometimes the trial focuses just on the responsibility of one party. When comparative negligence is not claimed or allowed, for example, jurors are supposed to just look at the defendant. But even in those situations, jurors will still want to focus on the ways everyone could have protected themselves.

For example: *Whether the law allows them to or not, jurors are likely to look at the plaintiff's own contributory factors: The fact that the plaintiff was injured in a voluntary outdoor activity far from a hospital, or the plaintiff's wife's failure to observe signs or to advocate for different care.*

**10. How Will the Selection Process Change the Landscape for Trial?**

We may know what the community is likely to think about the case, but it is also worth thinking about how the selection process is likely to skew that sample in a particular direction.

For example: *In this community, many jurors are likely to have experience with the defendant hospital, and predictably, those experiences will be both positive and negative. But those with negative experiences are more likely to be removed for cause, and that means that the process of deselection is more likely to favor the defense. Those who have strong negative attitudes about medical care, strong negative experiences with medical professionals, or direct experiences with heart attacks or other relevant case specifics are unlikely to be on the jury.*

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**Other Posts on Mediation:**

- Bring the Jury Into Your Mediation
- No Blank Slate (Part 3): With Judges, Arbitrators, and Mediators, Don't Assume They're Neutral
- Break Through the Barriers: The Settlement Series, Part One

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