



# Show and tell

## Up until trial, the adjuster and defense lawyer are your jurors



Cooper

BY MILES B. COOPER

The mediator, just finished with the preliminaries, turns to the plaintiff's lawyer. "Anything you'd like to say to the other side while we're all here?"

The plaintiff's lawyer responds. "We've said pretty much everything in our brief." He points to a brief in front of him – on pleading paper, with some exhibits attached to the back, and it withholds a couple key points that the lawyer intends to spring later. The joint session concludes.

The defense does not make an offer anywhere near the value of the case. No surprise.

### Defense counsel and adjuster as jury

Up until trial, the adjuster and defense lawyer are your jurors. You must prove to them that your case is worth your price. Since so many good cases settle, the adjuster and defense lawyer sit as your jury more often than not. So treat them like jurors. Capture their attention. Know their limits.

### Show your cards

Unless the defense and adjusters know how you are going to win, they won't pay. Most opponents have been around the block. They know what you've got. And if you cleverly hold back a key point until trial, they'll see it there anyway. They'll eventually make an offer your client will likely take. But that's only after you've put in the extra time and the added expense that eats into the client's recovery.

### Capturing their interest: The brief

Before mediation comes the brief. Unfortunately, most people live in flatland<sup>1</sup> when presenting information. They think of a mediation brief as just another pleading. Caption. Pleading paper. If there's anything vaguely interesting, it's attached as Exhibit X, which requires the reader to stop and flip to a tab.

So what can you do? Clean up the clutter and streamline the document. Every drop of ink must persuade. Captions and pleading formats belong on pleadings – nowhere else. Embrace negative space (white space) to emphasize your content. Use sub-headings to break up the monotony of paragraphs and guide the reader forward. Embed the photos and images of important documents into the brief. Simple steps make your brief interesting and easy to read.

### Every case has visuals

Find your visuals and use them. A *before* versus *after* picture of the wrecked car. The x-ray of the pins, plates and screws that

have rebuilt your client. An animated demonstration of a difficult concept.

The world is changing. You can do tremendous things with electronic briefs these days. One can embed video, audio and animations in briefs. With iBooks, you can now make briefs easy to read on an iPad. But recognize e-briefs' limitations. I was sitting in a defense firm waiting area when an e-brief arrived on disk. The partner walked out to the receptionist, handed it to him and told him to *print* it out.

### To present, or not to present

We've noticed a trend in mediation toward skipping the joint caucus. This is appropriate in many cases. But sometimes the other side needs to hear from you directly.

If you decide to present, let the opposing counsel (and mediator) know in advance. You don't want to embarrass your opposing counsel (one of your jurors) by rolling in with a closing argument while he is caught flat-footed in front of his client.

Strategize. Consider who should be in the room. Does your widow need to sit and listen to what the truck did to her husband? (Probably not.) Should you or the mediator make sure that the right defense people will be physically present? (No-brainer.) Should you encourage the defense team to ask questions? (Probably, but you're in for a longer session.) A presentation frequently means the defense team has to take the information back for more authority (a good thing.) This takes time and means you probably won't settle that day. Let your client know this in advance.

### The second mediation

Back to the failed mediation. As trial approached, the lawyer, after some prodding from the mediator, agreed to a second mediation. And in the joint session, the lawyer presented his opening statement, PowerPoint and all. A settlement, and a win for the client, followed later that day.

*Miles B. Cooper is a partner at Rouda Feder Tietjen & McGuinn. He represents people with catastrophic injury and death claims. In addition to preparing his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat and schlepper over his career and is a member of the American Board of Trial Advocates. Cooper's focus beyond litigation includes trial presentation technology. When not working on injury or death cases, he volunteers with the Volunteer Legal Services' pro bono programs.*

### Endnote:

<sup>1</sup> With credit to Edward Tufte, who coined the term as it relates to information on paper. If you have not heard of Tufte or seen his work on visual displays of information, visit his Web site [edwardtufte.com](http://edwardtufte.com) to learn more and see when he will be in town next to speak.