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COLUMN

Listening and seeing – perceiving reality

BY GREG DAVID DERIN

Ten years ago my brother-in-law, John, an award-winning television writer, director and producer, taught a class on storytelling at a local university. Given our frequent discussions regarding storytelling and perception, he asked me to participate as a guest lecturer. We ran an exercise with the students in which someone unexpectedly interrupted the class and made a dramatic pronouncement and plea for assistance. After we responded to her request, the person left. An hour later the students were asked to write what they had observed and turn them in after lunch.

When we reviewed the students' submissions we were fascinated by the variance in their perceptions. There was a wide divergence among the students as they described the identity and behavior of the intruder and what s/he said. Even more intriguing, the students did not agree as to the number of intruders who entered the classroom a mere hour before, and the interaction among them.

I came to the class as John and I had shared our professional experiences regarding perception and reality – he as a dramatist and I as a litigator, mediator and arbitrator. We were interested in

exploring how the distinction played out in his fictional portrayal of life and in the stories I had seen unfold in courtrooms, mediations and arbitrations over thirty years of complex litigation experience.

In *The Man Who Shot Liberty Valance*, screenwriters James Warner Bellah and Willis Goldbeck famously advised “[w]hen the legend becomes fact, print the legend.” Every character has a “legend.” So to every person who enters a courtroom or similar venue. In adjudicatory proceedings, each side will tell a story, from which the court, arbitrator or jury may adopt a third story which they may utilize in assessing liability and damages. Each player in this drama – witnesses, parties, experts, consultants, attorneys, trier of fact, journalists and others – brings a lifetime of experience and cultural overlays and emotions to bear in filtering information and developing their perception of “reality.” But how good are they at seeing or listening to the “reality” perceived by others?

In his famous Allegory of the Cave, Plato described the lives of individuals who had been imprisoned and chained in a cave since birth. They had never experienced the outside world. The prisoners

could not turn their heads; they could only stare at a wall on which shadows danced. Behind the prisoners a fire burned and provided light for the shadows. There was a parapet behind the prisoners on which puppeteers could walk and carry objects used to cast the shadows. As the prisoners saw nothing except shadows, they believed them to be real objects or creatures, although they were only the appearance of reality. When the prisoners were released from the cave, they realized the error of their thinking and gained a more accurate perception of the world.

To ancient Greeks, like Plato, seeing was a path to knowledge. If the prisoners could turn their heads, they would see the wall, see the objects casting the shadows, and gain a better perspective on reality. So too, when they emerged from the cave, they gained a richer, more fulsome understanding of the real world. All cause for deeper introspection if one chose. Plato's mentor, Socrates, observed “[a]n unexamined life is not worth living.”

In other cultures, knowledge is less dependent on physical observation. In Judaism, for example, listening is a path to knowledge. In fact, it is valued as a spiritual act.



Questioning and challenging are fundamental elements of Jewish spiritual engagement, with roots in active listening. Regarding listening as therapeutic, it became the fundament of psychotherapy and many religious practices.

Conflict occurs in our everyday life, and we create stories to deal with it. Our stories define, limit and help us cope with the chaos of conflict. Although our subconscious minds process what is real and what is imagined, we tell ourselves stories to make the world consistent with our feelings, actions and especially, our desired outcomes. Necessarily, parties are both the victims and heroes of their own stories, and deem them-

selves to have acted rationally and justly. Stories always point to a party's suggested one true meaning and exclude other possibilities. The more often the story is told, the more certain the facts become; inconsistent facts disappear or are denied.

Mediators hope to help parties view the composite story which emerges from understanding the essential elements of each party's perspective. Truth generally cannot be determined in a mediator's conference room. Consequently, a mediator's emphasis is on how narratives operate to create "a reality," rather than demonstrating a definitive "reality," which can be measured objectively to determine who will prevail before a trier of fact. The power of stories will usually motivate movement in a negotiation. Mediators listen to stories for "access points" – ways to bring parties more deeply into an understanding of their own interests and those of their adversary, and thus engage in conversation with parties with whom they have a conflict.

Parties see the world through their own lens. In fact, this is the source of most of the conflicts which I have seen in more than 40 years of litigation. As appropri-

ately zealous advocates, counsel often filter facts and evidence through their client's prism – one uniquely focused to magnify their client's version of reality. Given that more than 98% of civil cases resolve without a trial, what can lawyers do to facilitate a learning and understanding process?

1. Encourage Clients to Listen.

Clients need not accept the version of reality perceived by their adversary. But in assessing their risks, the likelihood of success at trial, and their options for resolution, it is useful for parties to attempt to understand the perspective of their opponent. Counsel can perform a valuable service by encouraging their clients to challenge their own view for these purposes. By communicating a willingness to understand, even without accepting, parties gain trust and credibility, and communicate respect. This in turn affords opportunities to learn, develop potential options for resolution and may even move toward reconciliation. This is a difficult task. It requires wisdom and the ability to listen for the emotion behind the words and silences. It is a skill honed by good mediators, but counsel who recognize the opportunities and help their

clients hear between the words provide an invaluable service.

2. Be Vulnerable. A corollary to being open to understanding opposing versions of the facts is finding the right context for doing so. Increasingly, parties and counsel are unwilling to sit with their adversaries to engage in this exchange. I rarely find a traditional opening session helpful given the structural temptation to make opening statements rather than engage in dialog. However, following a mediator's instinct to assemble appropriate groups to discuss specific agenda items can be very effective. Whether it is a meeting of counsel, the parties meeting without counsel but moderated by the mediator, or full group meetings, if the agenda is discreet and structured so expectations are established the rewards can be bountiful.

3. Reframe Your Client's Story.

Aided by the mediator, counsel can encourage clients to reframe their own stories – to think of them differently – in light of the alternative versions which a trier of fact will hear from their adversary. If a party comes to realize that the trier of fact may perceive

their opponent's story as being equally or more plausible, they may be open to reframing their own perception of what happened to accommodate all concerned – just as the judge or jury might.

4. Test Your Client's Alternatives.

Armed with the varied stories and supporting facts, counsel can work cooperatively with their mediator to test their client's best alternative to a negotiated agreement. Whether by objectively evaluating legal and factual issues, engaging in a decision-tree analysis or cost-benefit review, focusing on realistic settlement values and opportunities creates clarity regarding the viability of a claim.

Listening deeply and actively provides a productive path to testing one's perception of the shadows and finding a path to resolution.

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