

Kluwer Mediation Blog

What Movie Do You Want To Make?

Jeffrey Krivis (First Mediation Corporation) · Wednesday, April 16th, 2014

The arc of a litigated case has many narratives, particularly when it comes to settlement opportunities. While some cases fall into standard, often repeated formulas, others cannot be scripted. Yet, there are moments in the cycle of a case where some litigators simply react to events as they unfold rather than actively creating the settlement drama. The drama of a case is like storytelling in a trial, where events unfold in front of an audience of people who are in a position to evaluate and put a price on the story. Knowing what scripts are available in advance will assist in being less reactive and more resilient in achieving a better process and successful resolution.

To learn about creating the most optimum mediated settlement narrative, surprisingly, a review of some famous movies help illuminate and provide guidance. In each of the movies listed below, there was some turning point that allowed the resolution of the drama to unfold in a different direction, usually (but not always) positive. These shifts can help script your next settlement narrative, and serve as techniques that can be integrated into the case, particularly when settlement is the primary goal. Imagine the role the mediator might play in each of these movies, then see if you can adapt it to your own script.

(1) **The Green Mile:** This is a story of a shy, soft spoken death row inmate who was wrongfully convicted of the rape and murder of two young girls. The story reveals his super natural healing powers and his philosophy that there is too much pain in the world. The inmate uses his powers to “take back” the pain from others and giving a part of himself to the people who need the most help.

Consider the possibility that the role of the mediator is played by the death row inmate, who acts as a sponge in soaking up the distress that is presented by all sides. In that capacity, the mediator takes the bullet for the parties, offering to stand in the middle of adversity for the sole purpose of helping warring parties find a peaceful solution.

(2) **Damn Yankees:** A pathetic Washington Senators baseball fan (Joe Hardy) makes a deal with the devil to trade in his future for a chance to play center field and be the long ball hitter for his favorite team. Joe Hardy is wildly successful and his team is close to winning the championship, when he longs for his former life with his wife. The Devil refuses to give him back his previous life, and does everything in his power to ensure that Joe Hardy fails, including finding a home wrecker (Lola) to interfere. The Devil and Lola end up in hell and love wins out.

The tension in this story is mediated by recognition that the “winner takes all” approach is short lived. Once Joe Hardy sells his soul to the devil, he gives up everything that means anything to him in his life. The mediator is his soul speaking to him about setting priorities and how to manage the

need for instant gratification.

(3) **Fiddler On The Roof:** Tevya, a poor Jewish milkman with five daughters and a wife living in a Russian shtetl, struggles to reconcile his instinct for survival through traditions against a life of uncertainty and imbalance in a changing world. A key scene is when the butcher Lazer Wolf meets with Tevya to ostensibly discuss the sale of Tevya's milk cow, when in reality Wolf is looking to ask for Tevya's blessing in allowing him to marry Tevya's daughter. Tevya and Wolf talk over each other, not understanding or comprehending their mutual objectives, until it finally hits Tevya like a brick on his forehead what is really going on. Communicating with different perceptions make it difficult to achieve your goals.

Had there been a mediator in this scene, she would have served to identify the misunderstanding between the parties and helped shaped their dialogue so that there was clarity in their expectations.

(4) **Butch Cassidy and the Sundance Kid:** While being chased to the top of cliff by the sheriff and his team, Butch and Sundance decide to jump over the cliff into a running river below to find their freedom. This is a fatal decision because the consequences of the jump have not been fully vetted. Sundance doesn't know how to swim.

Showing the parties where the cliffs are located and what happens when one is faced with going over the cliff is a key role of a mediator.

(5) **The Godfather:** The strategy of the Godfather in negotiations was to sit back, be silent and wait for the other side to move. Usually this resulted in impasse. The Godfather didn't believe in reciprocation or mutual cooperation because he didn't have to. He played a winner take all game. His best move was to simply make an offer they could not refuse.

This strategy works all the time, but only if one party holds all the cards. It rarely works in a mediation setting because of the uncertainty of going to court and how the evidence will play out. On the other hand, if a case is at the courthouse steps and a jury ready to be selected, the Godfather's approach might be very useful. It would not be appropriate in an early mediation or even during the middle of discovery, unless evidence came out that was so devastating that the outcome was predictable.

(6) **Star Trek "Loud As A Whisper":** Riva, known as the greatest mediator in the universe, has a slight problem. He is deaf and mute. To counter this limitation, he has three people who make up his "chorus." The chorus has the ability to telepathically communicate with Riva and enunciate his thoughts. During the first session of their mediation, the warring factions shoot at each other and kill Riva's chorus, making it impossible for Riva to do his job and help facilitate a settlement. Unfortunately the warring factions don't trust anyone to help them with their dispute except Riva. In order to solve the dispute, Riva returns to the Enterprise and learns to speak sign language. Once this occurs, he is in a position to return to his role as mediator. The takeaway: Riva turns a disadvantage into an advantage.

When parties come into the mediation process, there is usually a power imbalance. The mediator plays the role of leveling the playing field so a negotiation can occur in a transparent way. Parties are able to make informed choices about which direction to go.

(7) **Jerry Maguire:** This movie is the source of the now famous line, "show me the money." Jerry Maguire's football client speaks the line numerous times during his relationship with his agent

Jerry, and it has become an anthem in negotiation circles. Yet, Maguire needed his client to perform at the highest level before the money was on the table.

Sometimes the mediator serves as negotiation and communication coach for the parties. Like Jerry Maguire, the mediator encourages the parties to prepare in a manner that encourages, not discourages, meaningful settlement discussions.

(8) **A Civil Action:** In this water contamination litigation, the lead trial lawyer over negotiates to the point that his firm ends up in bankruptcy and the careers of some talented lawyers were ruined. None of this had to happen had the firm considered the reasonable offers that were available to settle for their clients.

Had there been a mediator in this case, there clearly would have been a straight forward evaluation of the risks of not taking the money, and what that would mean to the clients and the lawyers. Hearing this from someone with no skin in the game can have a major impact that is sometimes not anticipated by those that are in the midst of battle.

The list of movies can go on indefinitely. Paying attention to these unfolding dramas provides rich material for creative litigators. It also helps in understanding what role the mediator often plays when parties are going in polar opposite directions that are off the settlement grid.

You can decide how to integrate these ideas into your negotiation practice, particularly when involved in or anticipating an upcoming mediation process. These ideas don't replace hard bargaining. In fact, there is nothing wrong with hard bargaining. That's expected in every case. A "unique to mediation" problem arises when the parties negotiate against the mediator. These movies demonstrate that a mediator is positioned to guide the hard bargaining trial lawyer in such a way as to not jump off a cliff into a river when they don't know how to swim. By not using the mediator as your guide, and continuing to bargain against the mediator, litigators run the risk of fooling the mediator into terminating the process when settlement might be possible.

The mediator can and does focus on critical issues only while bringing an objective view of how a neutral sees the case for the first time. That can be accomplished in a non-adversarial way without weakening your chances of a good settlement or embarrassing the lawyer in front of her client. This requires the exchange of broad and reciprocal licenses between the mediator and the lawyers to be blunt and direct, while honoring with respect a disagreement on how to evaluate the case. In short, the mediator is uniquely positioned to show the parties the minefields through devil's advocacy and how it will play out in court.

Once it is understood that negotiating against the mediator is a recipe for failure, it is helpful to allow the mediator to recommend a settlement range, based on his or her evaluation of the dispute. This will accelerate the exchange of numbers in a confidential manner that is not going to put either side in a vulnerable position. If the range matches your goals, then it will be fine-tuned. If not, the mediator will try a different path to determine what the range actually is, or default to traditional bargaining and exchanging of numbers. During this entire process, the mediator will request confidential but firm commitments as to what each party will agree to, but will not disclose that to the other side.

Understanding the drama and narrative of a mediated case is not appropriate for a "winner-take-

all” competition. That process belongs in court and is played out successfully every day. Playing out the narrative in a game of mediation is a form of winning the game because of resiliency and creativity. Now, let’s go out and make a movie!


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