

Time Travelling

A Vision for the Future Through Three Dimensional Glasses

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On New Year's Eve, 2013, my husband and I went to see the new movie, "Zero Dark Thirty". In an Arc Light theatre in Hollywood, we donned our 3-D glasses, ordered some unbuttered popcorn and sat back and watched as the painful, dramatic and hidden search for Osama Bin Laden unfolded before us—in three dimensions.

Much has been written and considered about mediation as "The Third Side" (William L. Ury) and "View from the Middle of the Road: A Mediator's Perspective on Life, Conflict and Human Interaction" (Jan Frankel Schau), but I think the future of mediation, just as film, will offer yet a different and more meaningful, personalized experience of conflict resolution.

Accomplished trial lawyers are, at their best, eloquent storytellers. They take a set of facts, spin the tale with words, diagrams and emotion and make it understandable and credible to a box of uncomfortable strangers (a jury), who will "judge" those facts and that story and decide right and wrong. In mediation, we are time travellers.

Consider the employment disability discrimination case in which an employee is cracking under the stress of her job for months when she finally seeks medical attention and is ordered out on disability leave. When the Company does a reduction in force, and includes Eloise in that cut, while she is still out on disability leave six months later, she is devastated. Her trial lawyer can easily establish that this was pretext and that the real reason she was terminated was because she had become a whistleblower and a nag. She was complaining about the way the supervisors in her department overworked the staff, and she was right. Damages should be paid. Two years later, now retired, mediation will offer Eloise the chance to look beyond her past. She can examine her present: surrounded by two lawyers, having to put on a business suit, give up a day with her grandbaby and suffer the anxiety of deposition preparation for the scheduled testimony of her and three of her former co-workers the next week. She can also begin to imagine her future: a set amount

of damages, a cap on her attorney's fees, no more costs of litigation, no trial in Spring, freeing her to travel and perhaps enough money that she can replace her old car with something more reliable.

Time Travelling During the Mediation Hearing

At the time of trial, jurors and judges are asked to figure out what happened between two parties that caused the problem, who was at fault and what damage was caused. It is an examination done retrospectively. In fact, lawyers are not permitted to introduce new facts or claims into evidence without first asking for leave to file amended complaints. The lawsuit and ultimate trial is limited by whatever happened in the past which one party has formally accused the other of doing wrong.

While mediation may begin by focusing upon the legal claims and defenses raised in the lawsuit, mediators are not limited by the legal claims made before the hearing has begun. To the contrary, the flexibility of mediation allows for an examination of how the conflict is affecting the present day for the disputants too. For example, are they lying awake at night worried about the possible outcome of trial? Are they vindictive, bitter, hardened or hurt? Are they anxious, exhausted or financially in dire straits? Each of those considerations are likely not germane to the trial lawyer, but very important factors at mediation. The present counts as much as the past.

Finally, and gradually, mediation can offer the disputants a chance to envision a better future. Perhaps wealth is exchanged, perhaps apologies are made, and perhaps they can leave the dispute relieved of their own guilt, bad feelings, and lack of understanding. Perhaps tomorrow night they can sleep—knowing that they were heard understood and vindicated. Perhaps an indigent Plaintiff can finally get out of debt and afford necessary on-going care for her children. Perhaps a man who lost his job can return to school and begin a new career without worrying about how he will feed his family for the next year.

As mediators, we can walk the parties through not only their past, but towards a better future. That is why time travelling can be so very valuable—limited only by the human imagination.

Future Litigation will look more like Surgery than Literature

As fewer and fewer cases go to trial, the exercise of litigation will change in the future, too. The purpose will not be necessarily driven by the lawyers who may try the case, but rather by the clients who know what information will be necessary to properly evaluate the

claim. In the illustration of *Eloise v. Big Co.*, this would mean probably fewer depositions would be taken and more personnel records offered.

As more lawyers become specialized, the precision with which they conduct discovery will likely change. And as clients become more sophisticated in litigation and its outcomes, I believe that they, too, will demand a more precise “cut” into the inner workings of the legal issues. I believe that the legal profession in the U.S. will begin to look more like the one in the U.K., where some lawyers are full time litigators, and others are “trial lawyers” for the “when all else fails”. I believe that clients will demand that every effort be made to settle the dispute once the biology of the conflict is understood. And I believe the clients will be more vocal in advocating that the surgery conducted by the litigators be sharp, precise, but not so extensive that you risk killing the patient for the sake of fully understanding the pathology of his disease.

Mediation will become Multi-Dimensional

Finally, I think the future of mediation holds that same concept as 3-D film making in that disputants will come to expect a more personal “touch” than a jury or judge can offer to them. The experience of being sued or bringing suit can be excruciating to a client. Both attorneys and their clients may be kept awake at night ruminating about the past and hoping that the ultimate trial will reveal some deeper “truth” and result in some objective “justice”. Mediation will offer a critical opportunity to express each individual’s own “truth”. Although it may not always result in an objective “justice”, the personal experience of relating the story and the opportunity to affect both present and future will offer many more restful nights.

Part of the challenge of modern litigation is that it is viewed as consistently two-sided: polarity between a Plaintiff and a Defendant. I believe that mediation will offer an opportunity to look at conflict from many dimensions: from the inside out (for example how it is affecting the disputants emotional well-being, not just financially), from the upside to down (for example is the reason for the miscommunication based upon a system of hierarchy within an organization or company?), from the outside in (how is this conflict affecting the broader family system, corporate morale, governmental rules of a given system?).

Once the disputants are asked to examine these multi-dimensions of a conflict, there are also many more paths to unlock and solve the

puzzle. The solution is not limited to financial compensation (as it is primarily in court). Parties may be given an explanation for certain conduct, an apology, an acclamation for work well done, a chance at future relationships, whether arising out of business, family or friends. It is, of course, difficult to predict how this will all turn out, but mediation is undoubtedly playing a supporting role in the future of litigation as the lights, camera, and action go largely unscripted.