Mediation in Film, Television, Art and Real Life

By Judith B. Prowda and Jason Aylesworth

Introduction

Conflicts are often dramatized in film, literature and other art forms. Anyone who has grown up watching Perry Mason can attest that the excitement of the courtroom, as usually portrayed through the heated adversarial actions of the litigators, is what drives the story. In real life, however, litigation is often protracted, subject to countless motions, lengthy discovery, grueling depositions, repeated delays and mounting frustration. Not exactly fodder for a fast-paced drama on the screen.

Sometimes the art itself is the subject of the conflict. A dispute might occur between a gallery and artist over a representation agreement, an expert and executor over the valuation of an estate, a buyer and seller of art over a warranty of authenticity, a nation seeking the return or restitution of a cultural treasure, or an heir of a Holocaust victim claiming ownership to a work of art in a public or private collection. As in the movies, parties involved in such an art dispute typically resort to litigation. Yet art professionals, like business people in other entertainment-oriented fields, recognize that litigation can be enormously expensive, time consuming, and destroy any possibility of future relationships, either business or personal. In addition, litigation is generally a matter of public record, and may have an adverse effect on business and the reputation of the parties, which are enormously valuable in the art world. By contrast, mediation[1] is typically more efficient in terms of cost and time, and has the advantage of being private and confidential. Alternative dispute processes are normally consensual, meaning that the parties would either need to agree to a contractual Alternative Dispute Resolution (ADR) provision for future disputes, or voluntarily chose a form of ADR for their existing dispute. ADR can also be mandated by a competent court, or established by law or treaty.[2]

This article highlights the sparse portrayal of mediation in film and television, showcasing an albeit brief evolution from fictionalized divorce proceedings between spouses (the familiar setting for mediation conferences) to dramatized clashes amongst musicians and other artists (the growing trend in the entertainment industry). It explores a practical real life account of how in recent years disputes involving art and cultural property are increasingly being resolved by mediation, in a more efficient and sustainable manner.

I. Mediation Portrayed in Film and Television

Hollywood has offered strong depictions of litigators over the last 25 years, but has been weak on mediators. Perhaps that is because courtrooms provide a formal arena where attorneys battle for absolute victory, creating dramatic tension between the antagonist and protagonist. Mediation conferences, on the other hand, may offer sparks during the first act, but ultimately climaxes are tame due to an "everybody wins" conclusion. Entertainment is truly the primary goal of most film and television works, but education has always been a close second.

Most audiences are not familiar with mediation due to a lack of depictions in both film and television. One of cinema's first purported "mediations" was in the film *Disclosure*.[3] The central plot of the film involved a work-related sexual harassment dispute between a male employee (played by Michael Douglas) and his female boss (played by Demi Moore). Immediately after the claims are made, both parties must attend a mediation conference. The problem is that the mediation portrayed in this movie was actually an arbitration hearing.[4] Even though it is a step forward for proponents of ADR to have mediation dramatized in a commercial film, this misstep illustrates the confusion of a moviegoer who believes he or she is watching a mediation conference. This may seem like a trivial point, but audiences are influenced by Hollywood's depiction of reality in the legal world. If stories through celluloid and digital media could sway viewers towards ADR, those spectators may actually transform pre-conceived litigious fights into cooperative solutions for all.

The leading area of practice where mediation has been portrayed over the last 25 years has been with domestic disputes, particularly in divorce proceedings. Prior to this period, most divorces were fought within family courts. One of the most memorable films that showcased a heartbreaking divorce through litigation was *Kramer vs. Kramer*.[5] Not only did the movie demonstrate the financial burden of a contentious divorce, but it also illustrated how litigation could emotionally destroy an already wounded family who wanted to move on with their lives separately. What was ultimately resolved between the husband and wife (played by Dustin Hoffman and Meryl Streep), was that they found a mutual interest in agreeing on what was best for their only child. Despite falling out of love with each other, they had a common priority in deciding what was best for their son. A mediator may have helped reach that conclusion much sooner. Instead, both attorneys representing the estranged partners used hurtful tactics to gain false power in the battle between Kramer and Kramer, creating obstacles in trying to reach a resolution. While it is surprising that it took Hollywood about 25 years from *Kramer vs. Kramer* to portray how effective a mediator can be in a divorce proceeding, it is more surprising that it was shown in a raunchy comedy.

The opening scene of *Wedding Crashers*[6] was played for comic effect, but it was probably the closest scene in celluloid to capture a mediation session. Vince Vaughn

and Owen Wilson serve as mediators. They are in the midst of resolving the issue of who will retain the former couple's frequent flyer miles. The husband and wife engage in a heated exchange, jabbing each other with accusations and insults, but by the end of the five-minute scene, they eventually work out the frequent flyer miles, and it appears that all other terms have been settled. However, the husband suggests that the two mediators cease speaking. Why? Possibly because the mediators offered that marriage was a ridiculous institution and that the parties should put their swords away in an effort to move on. The husband may have been somewhat insulted by the mediators, feeling that he was naïve to get married in the first place (and it is true that both mediators were swinging bachelors and proud of it), but the mediators did accomplish the goal of the parties in the room (including the frustrated attorneys representing the husband and wife): to agree to an equitable distribution of the marital property, and to move on with their lives separately. Unlike litigators, mediators listen to all parties involved and collaborate to achieve an interest-based solution where everyone walks away with some humanity. The outcome of the opening scene in *Wedding Crashers* was not about who was right or wrong about getting married; it was about realizing that both parties made a mutual mistake that could be resolved without destroying the relationship any further.

Mediation has evolved in the media as it has evolved in other areas of law. One television series whose main character was a mediator was the recently cancelled *Fairly Legal*.[7] In its two abbreviated seasons, a wide variety of disputes were showcased on a weekly basis and viewers watched how those disputes were resolved by the mediator rather than be decided by a judge. Only a few of cases involved domestic relations disputes. Stories about wrongful termination, intellectual property rights, scholastic coaching practices, exonerated citizens, and tortious actions were told through the show. Even one episode, entitled *Ultravinyl*,[8] focused on two entertainment-related disputes. In it, a publishing company was trying to get the original band members to execute a license to assign rights to a one-hit wonder. The underlying problem was that two of the band members did not want anything to do with the third band member. While the mediator recognized the goal of exploiting the song, she also recognized that there are some other issues which were keeping the parties apart. Using information-gathering techniques, she uncovered the honest desires of the band members, and was able to arrive at a solution while maintaining relationships to the best of her ability.

The other dispute in this episode of *Fairly Legal* involved an online battle in the gaming world, which was secondary to the overarching music publishing quarrel. The fighting parties insisted on communicating through avatars, but the mediator felt that communicating in person facilitated the negotiations. What was fascinating here was that the parties were not hiding behind a digital fantasized character, nor protected by a powerful litigator. On the contrary, they were able to voice their concerns in person, without the theatrics, and maintain a relationship with each other not only in the virtual gaming universe, but in the real world as well.

Besides music publishing and online role-playing game disputes, mediation has been an effective tool in other areas of entertainment, including fine art.

II. Mediation of Art-Related Disputes

Whether mediation is portrayed in fantasy on screen or practiced in reality, its perception has gained acceptance in entertainment-oriented fields, including visual art. Disputes over the ownership of artworks, for example, are increasingly settled with the assistance of a mediator. Litigation of such disputes, which are often amongst multiple claimants from different jurisdictions, can be complicated by conflicts of laws on statutes of limitation and approaches as to what constitutes legal title to stolen property, which differ in common and civil law countries. Due to the international dimension, as well as the expense and unpredictability of litigation, it makes sense to consider non-binding mediation or binding arbitration (or a combination of both)[9] as a dispute resolution process. Creative solutions may be obtained in mediation by exploring each party's interests, including non-monetary concerns. A court decision, by contrast, will generally result in a winner-take-all situation, and is limited to deciding the matter before it, not in formulating options for the parties.

In recent years, art businesses and other organizations have trained professionals who are dedicated to dispute resolution over ownership challenges. Auction houses, such as Christie's and Sotheby's, attempt to resolve claims of ownership amongst multiple claimants quietly and efficiently. Christie's Restitution Department has established principles of fairness, consistency and practicality in resolving Nazi-era art restitution claims, vetting provenance, and seeking just and fair solutions where problems arise.[10] Likewise, Sotheby's occasionally recommends non-binding confidential mediation to its clients.[11]

The Art Loss Register also regularly negotiates and mediates art-related disputes. To illustrate, in 2010, a work by the 18th century German artist Johann Zoffany, billed as the star lot of a sale of the contents of Gianni Versace's Lake Como villa, was withdrawn from a sale at a Sotheby's auction in London. Versace had purchased the work 15 years earlier without knowing its provenance or realizing that it was painted by the celebrated artist or stolen from its previous owner in 1979. The Art Law Register resolved the matter amicably, and the painting was returned to the original owner under confidential terms.[12]

The same principle is operating in the museum world, where the return of a contested work or works to the original owner is combined with a counterpart loan of different works altogether. For example, in 2006, the Met-

ropolitan Museum of Art (Met) returned the Euphronious crater and other objects in its collection to Italy in exchange for long-term loans of other antiquities of "equivalent beauty and importance."[13] Here, the Met accepted no liability for acquiring objects which were determined to have been looted, maintaining that it bought them in good faith.[14] Similar agreements were reached between Italy and the Boston Museum of Fine Arts in 2006[15] and the J. Paul Getty Museum in 2007.[16]

In the art and cultural heritage arena, the International Council of Museums (ICOM) and the World Intellectual Property Organization Arbitration and Mediation Center (WIPO) partnered in 2011 to set up a not for profit mediation center with procedures adapted to the settlement of cultural property disputes involving museums.[17] In addition, at its 16th Session in Paris in 2010, the United Nations Educational Scientific and Cultural Organization (UNESCO) adopted Rules of Procedure for Mediation and Conciliation for the resolution of requests for the return or restitution of cultural property. Under these Rules, parties may select mediators or conciliators[18] amongst independent experts for the restitution or return of certain cultural objects of fundamental significance.[19]

Concerning Holocaust-era claims, governmental advisory commissions, such as the New York State Banking Department Holocaust Claims Processing Office[20] and the UK Department of Culture, Media and Sport Spoliation Advisory Panel,[21] serve as intermediaries in cultural property disputes. Additionally, since the German "Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (Beratende Kommission)"[22] was founded in 2003, it has issued four recommendations on restitution claims brought before it.[23] Other national commissions on Holocaust-related art claims that have issued new recommendations or otherwise assisted in the resolution of such disputes include the Austrian Commission for Provenance Research[24] and the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value in the Second World War.[25]

In a recent initiative to train "current and future professionals of various backgrounds who are or will soon be engaged in dealing with Nazi-era looted cultural property and related post-Holocaust issues," intensive provenance training workshops are organized by the Provenance Research Training Program (PRTP).[26] This program is a project of the European Shoah Legacy Institute, which was created by the Czech Ministry of Foreign Affairs in furtherance of the Holocaust Era Assets held in Prague in 2009 and the resulting Terezín Declaration.[27] Issued by 46 states on June 30, 2009, the Terezín Declaration refers to "alternative processes" and "alternative dispute resolution" for facilitating "just and fair solutions" in matters relating to Nazi-confiscated and looted art, thereby confirming principle 11 of the Washington Principles of 1998. The PRTP focuses on provenance research and related issues concerning Nazi-looted art, Judaica, and other cultural property. The first workshop was held in Magdeburg, Germany in June 2012, followed by another in Zagreb, Croatia in March 2013.[28]

Furthermore, several non-profit organizations dedicated to art research, such as the International Foundation for Art Research (IFAR)[29] and the Commission for Looted Art in Europe (CLAE),[30] also provide information and assistance in the restitution process.

Finally, in 2010, the Geneva Art-Law Centre at the University of Geneva launched a research project that studies ADR methods for art-related disputes. The Art-Law Centre's research project includes the creation of a comprehensive database that documents art-related disputes worldwide that were resolved by means of ADR methods, as well as a thorough case analysis.[31]

III. Conclusion

While mediation scenes in films and television may not be as dramatic as litigious ones, they do offer audiences a satisfying resolution. Most audiences do not want open-ended storylines; they want some sort of closure. When a television series ends or a film trilogy concludes, the audience can discover other entertaining programs. The same principle holds true when choosing mediation as a forum: at the conclusion of the session, the parties will be able to move on with their lives rather than remain in a contentious dispute. Both *Wedding Crashers* and *Fairly Legal* have been able to educate audiences through entertaining stories about the benefits of mediation, but this is a thin representation of how effective mediation can be in real life situations. As illustrated by the global sensation of modern mediation practices in fine art, this mechanism has not only reached seasoned attorneys all over the world, but it has also taught their clientele the benefits of settling differences on an expedited basis without the financial burden imposed by litigation.

Endnotes

1. Mediation is a confidential negotiation facilitated by a neutral third party. In a mediation, the parties control the process and decide the outcome. It is distinct from other forms of alternative dispute resolution, such as arbitration, in which an arbitrator or panel of three arbitrators renders an award that is binding on the parties. *See* Judith B. Prowda, *The Art of Resolving Art Disputes: A Case for Mediation*, *in* ALL ABOUT APPRAISING: THE DEFINITIVE APPRAISAL HANDBOOK (Appraisers Ass'n of Am., 2d ed.) (expected publication in 2013).
2. *See* Sarah Theurich, *Update on alternative dispute resolution in the art and cultural heritage sector*, IBA ART, CULT. INSTITUTIONS & HERITAGE L. J. (Aug. 2009), *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c93cf2fa-f5f6-4a64-a7d1-8bd907fdf3dd.
3. *Disclosure* (Warner Bros. Pictures 1994).
4. Arbitration is a form of ADR conducted in a private setting where the parties agree to be bound by the ruling of an arbitrator or short panel of arbitrators. Unlike mediators, arbitrators do not assist adversarial parties on reaching a settlement. The arbitration in *Disclosure* was to determine the validity of the sexual harassment claims in the employer/employee relationship.

5. *Kramer vs. Kramer* (Columbia Pictures 1979).

6. *Wedding Crashers* (New Line Cinema 1995).

7. *Fairly Legal* (Universal Cable Productions 2011-2012).

8. *Fairly Legal: Ultravinyl* (USA Network television broadcast Mar. 20, 2011).

9. Since ADR procedures are flexible, they may be combined. For example, the parties may agree to attempt to settle the dispute in an initial phase, and if they fail, they will submit their dispute to arbitration. This is commonly referred to as "med-arb." This hybrid approach is becoming increasingly popular. If the mediation reaches an impasse, or if issues remain unresolved, the parties can then proceed to arbitration, which is binding. The mediator can assume the role of arbitrator (if qualified) and render a decision, or an arbitrator can take over the case after consulting with the mediator.

10. *See generally* Christie's, *Art Restitution*, http://www.christies.com/services/restitution/.

11. *See* Lucian Simmons, Paper Delivered at the Holocaust Era Assets Conference in Prague: Provenance and Private Ownership: Just and Fair Solutions in the Commercial Art Market (June 28, 2009), *available at* http://www.commartrecovery.org/sites/default/files/docs/events/LucianSimmonsPaperforPrague.pdf. Sotheby's opened a department dedicated to provenance research and restitution in 1997. The department is comprised of a team of restitution experts in London and New York, supplemented by consultants as necessary.

12. Jonathan Brown, *Versace's stolen art returned to its real owners—in Dorset*, The Independent (Nov. 23, 2010), *available at* http://www.independent.co.uk/arts-entertainment/art/news/versaces-stolen-art-returned-to-its-real-owners-ndash-in-dorset-2141130.html.

13. Randy Kennedy and Hugh Eakin, with Elisabetta Povoledo reporting from Milan, The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy, NYT, Feb. 3, 2006, at http://query.nytimes.com/gst/fullpage.html?res=9C0DE2DE163EF930A35751C0A9609C8B63&&scp=4&sq=euphronios%20krater&st=cse.

14. *Id.*

15. Elisabetta Povoledo, *Boston Museum Returns 13 Ancient Works to Italy*, N.Y. Times, Sept. 29, 2006, *available at* http://www.nytimes.com/2006/09/29/arts/design/29mfa.html; *See also* Museum of Fine Arts, Boston, *Italian Ministry of Culture Agreement*, http://www.mfa.org/collections/art-past/italian-ministry-culture-agreement.

16. Elisabetta Povoledo, *Italy and Getty Sign Pact on Artifacts*, N.Y. Times, Sept. 26, 2007, *available at* http://www.nytimes.com/2007/09/26/arts/design/26gett.html?_r=0.

17. *See* WIPO, *ICOM-WIPO Art and Cultural Heritage Mediation*, http://www.wipo.int/amc/en/center/specific-sectors/art/icom/. The ICOM-WIPO rules are available at http://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/. *See also* Sarah Theurich, *Alternative Dispute Resolution in Art and Cultural Heritage Explored in the Context of the World Intellectual Property Organization's Work*, 8 Kulturgüterschutz—Kunstrecht—Kulturrecht 569, 569-94 (Kerstin Odendahl & Peter Johannes Weber eds., 2010), *available at* http://www.wipo.int/export/sites/www/amc/en/docs/theurichbeitrag.pdf.

18. A conciliator refers to a third party neutral who makes a recommendation to the parties that they can accept or ignore, in other words, an evaluative mediator. A mediator facilitates a discussion between the parties. A facilitative mediator does not offer an opinion on the strength or weakness of each side's argument.

19. *See* UNESCO, *Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in case of Illicit Appropriation* (Oct. 12, 2007), http://portal.unesco.org/culture/en/ev.php-URL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html. *See also* Theurich, *supra* note 2.

20. *See generally* N.Y. State Dept. of Fin. Serv., *Holocaust Claims Processing Office*, http://www.dfs.ny.gov/consumer/holocaust/hcpoindex.htm.

21. *See generally* Department for Culture, Media, and Sport, *Spoliation Advisory Panel*, http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx.

22. *See generally* Lootedart.com, *Art Commissions: Advisory Commission on the return of cultural property seized as a result of Nazi persecution* (Beratende Kommission), http://www.lootedart.com/MFEU4E88305.

23. *Id.*

24. *See generally* Commission for Provenance Research, *Recommendations*, http://www.provenienzforschung.gv.at/index.aspx?ID=24&LID=2.

25. *See generally* Restitutiecommissie, http://www.restitutiecommissie.nl/en.

26. *See generally* Lootedart.com, *Provenance Research Training Program Workshop, Magdeburg, Germany 10-15 June 2012*, http://www.lootedart.com/PAJ3QI149491.

27. *See* Holocaust Era Assets Conference, *Terezin Declaration*, http://www.holocausteraassets.eu/en/news-archive/detail/terezin-declaration/.

28. Additional information about the Provenance Research Training Program available at http://provenanceresearch.org/.

29. For additional information about IFAR as well as summaries of cases and settled art disputes, *see* http://www.ifar.org/.

30. *See generally* Commission for Looted Art in Europe, *About Us*, http://www.lootedartcommission.com/Services.

31. The Geneva Art-Law Centre (www.art-law.org) is a non-profit Swiss foundation created in 1991 and now fully integrated into the Law Faculty of the University of Geneva. For additional information, *see generally* Art-Law, *ADR and Art-Law*, http://www.art-law.org/centre/recherches/fns_en.html. *See also* Anne Laure Bandle & Sarah Theurich, *Alternative Dispute Resolution and Art-Law—A New Research Project of the Geneva Art-Law Centre*, 6 J. Int'l Comm. L. & Tech.1 (2011), *available at* http://plone2.unige.ch/art-adr/Affaires/case-terrestrial-globe-saint-gall-v.-zurich/Bandle%20and%20Theurich%20-%20Alternative%20Dispute%20Resolution%20and%20Art-Law.pdf/view.

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