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Lessons from "Jerry Maguire" & Other Notable Phrases

By Laurie Quigley Saldaña

"SHOW ME THE MONEY!" screamed in a primal fashion by the professional athlete (Cuba Gooding, Jr.) to his sports agent (Tom Cruise) in the 1996 movie "Jerry Maguire" is, arguably, one of the most famous movie quotes of the 1990s. The good mediator, however, prefers the not-so-famous response issued almost in a whisper by Tom Cruise: "Help me help you."

Regardless of whether you represent the plaintiff or the defendant, that simple phrase—"help me help you"—should be the mantra for a successful mediation. Presumably, counsel and their clients attend mediation for one purpose: to end the litigation. The case may be worth millions or not a penny....but the mediator cannot do his/her job of "helping you" (by successfully ending the litigation) if counsel fails to effectively navigate the mediation process.

Here are some other notable phrases which, hopefully, remind both the novice and seasoned negotiator of what works in mediation and, regrettably, what does not. (Some facts changed to protect the innocent...)

"A Day Late And A Dollar Short"

Most mediators ask for mediation briefs anywhere from 2 to 7 days in advance of the mediation. Why? We read them. We think about them. We consider the facts, the law, the parties, the emotions, the pros, the cons, the power struggles, the ramifications of resolution, the ramifications of failing to reach resolution... and on and on. Mediators often schedule brief telephone calls with counsel after reading the brief and prior to the mediation session. During such calls, the mediator learns about other underlying issues involved in the case, asks probing (sometimes awkward) questions best asked outside the client's presence, clarifies issues of law or fact, and assesses the emotions (if any) triggered by the litigation and mediation. This guarantees that the mediator is as prepared as possible in order to get the job done.

In a recent case, I received 150 pages of documents from one of the attorneys the night before the mediation. Yes, I read every page. However, it was impossible, given the time frame, to digest and mull over all the issues, as any good mediator prefers. In my view, the best mediation brief provides the following: summary of the facts, law, and procedural posture; update on settlement discussions, if any; identifies non-monetary issues such as emotional conflict between the parties. In addition, rather than providing entire medical charts or deposition transcripts, go ahead and copy key testimony or other information directly into the text of the brief. That way, when you assert the strength of a particular argument, the facts supporting your position are front and center. If you don't want to exchange the entire brief with opposing counsel, redact certain portions, but provide the other side that with which you are comfortable. Please, help me help you by providing a helpful brief sufficiently in advance of mediation.

"Spring It On Them"

According to the free on-line dictionary, this means to "surprise someone" or "pull a trick on them." Is such a strategy really appropriate in mediation? Unfortunately, it happens all too often. In a recent employment mediation, plaintiff's counsel provided her brief to defense counsel 10 minutes before the mediation commenced. In the brief, she revealed—for the first time—several damning facts (which the defendant privately acknowledged as true during mediation) and a seven figure settlement demand. Defense counsel and the insurance carrier were caught flat footed!

This case should have settled, but did not. The insurance adjustor came to mediation with settlement authority in the five figures. Once she discovered the bad facts and the seven figure demand, she wanted more settlement authority, but could not get it on the day of mediation. Insurance companies often "round table" cases days or weeks prior to the mediation to determine a "reasonable range" for settlement. While some additional authority is often available the day of mediation, if the Plaintiff and Defendant differ vastly in their valuations of the case, the gap may be too large to bridge.

In a similar vein, I mediated a case recently where the defendant had a rock solid statute of limitations defense, but was still willing to pay "nuisance value" to avoid the expense of filing a motion for summary judgment. Unfortunately, this key defense was not revealed to plaintiff's counsel (except via the boilerplate answer) until the day of mediation. While plaintiff's counsel had educated her client in advance about the mediation process and what would likely occur, she had not discussed with her client this key defense, the ramifications of a summary judgment motion, or the possibility of a "nuisance value" settlement. At mediation, plaintiff's counsel quickly understood her case was in hot water once the strength of the defense was revealed; however, this was too much information for the plaintiff to effectively digest and understand on the day of mediation. The case did settle for "nuisance value", but not until several weeks after mediation. If the strength of the defense had been revealed in sufficient detail before mediation, time, energy, and money would have been saved by both sides.

Remember, your opponent wants and needs to be prepared. Your opponent wants to effectively educate their client (and insurance carrier, where applicable) about risk. Look...I get it. For strategy reasons, there are certain facts you may not want to reveal, in the event the case does not resolve at mediation. But your opponent came to mediation to end the litigation. Please, help me help you by providing your opponent with the type of information that you would want in advance to effectively value the case for a successful mediation.

"Need-To-Know Basis Only"

According to Wiktionary, this means "remaining secret or hidden until it is needed to be known." That's not necessarily a bad thing. However, please keep in mind that there are multiple levels of "need-to-know"... For example, there is information provided to your opponent and the mediator; information provided to the mediator, only; and information that you and your client may never tell the mediator. That's okay. The trick is knowing when and how to educate the mediator as to your true intentions and goals.

At a recent personal injury mediation, defense counsel did a brilliant job of convincing me (in the presence of her client), that very little money would be paid on the case and the defendant was ready—even happy—to go to trial. After several hours of mediation, I had a private discussion with defense counsel (without her client present) wherein she continued to assert that the defense "top dollar" was X and not a penny more. The defense took a "take it or leave it" position and the Plaintiff walked.

The next day, the defense attorney called me and said, "I'm not sure what happened yesterday...my client was willing to resolve the case for three times X, but the plaintiff walked." This was a complete about face from the position taken during mediation. In my opinion, at mediation, the defense should have indicated to the mediator a softening in their position in order to keep the dialogue going. The private meeting between the mediator and defense counsel was the perfect forum for such a discussion. While mediators often

"read tea leaves" during the mediation to understand the signals from each side, we are not mind readers. (This case later resolved, after several phone calls and mediation via phone).

Attorneys are placed in a tough position at mediation. You want to be a strong advocate in front of your client... a true believer in your client's position and ready to slay dragons at trial. I get that. But at some point—regardless of whether you represent plaintiff or defendant—if you truly want to resolve the case at mediation, consider sharing information that will help the mediator keep the process moving forward.

What information is disclosed (and when) may depend upon your relationship with the mediator. I work with some attorneys who bluntly tell me in the first 5 minutes of mediation what they are willing to pay/accept to resolve the case, then they say, "make it happen." Other attorneys take the "need-to-know" approach and only reveal their true intentions after several hours of negotiating. Both of these approaches can be successful. The key is to remember the mediator is there to help you. So tell the mediator your intentions (confidentially, of course) so he/she can resolve the case. How is this done? Again, it depends upon your style and relationship with the mediator; however, a private conversation with the mediator (without your client) may be the perfect forum to reveal there is "give" (maybe a lot!) in your number so the mediator may continue working toward resolution. Please, help me help you, by indicating your goals while everyone is still under the same roof; resolution is infinitely more difficult after everyone returns to their own offices and focus is lost.

To paraphrase Cuba Gooding, Jr., as a mediator, I want to "SHOW YOU THE DEAL!" That's my job and I take it seriously. With some forethought and the appropriate level of candor, you can help me help you "show you the deal."

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