

Lessons From *Fahrenheit 9/11*: How To Defuse Moore-Style Tactics Used In Mediation

By Max Factor III, Mediator

Going to see Michael Moore's controversial documentary *Fahrenheit 9/11* won't earn you continuing education credits, but there's plenty that a litigator can learn from watching the movie.

There are two very different techniques Moore uses repeatedly. One is effective persuasion, and is clearly intended to persuade the uncommitted. At other times Moore uses shock, satire and derision to drive his points home – at the risk of alienating anyone who does not share his beliefs.

The first technique is used frequently by most fine trial attorneys, but it is one Moore uses sparingly.

One of these rare instances is when Moore shows us the unvarnished story of Lila Lipscomb. She has a low-paying job helping unemployed workers in Flint, Michigan find jobs. A religious Christian, she is a white woman married to an African American. They have several children, two serving in the Army. She and her husband represent the “backbone” of American family life.

We feel her determination and her pride in her family's hard work, and we root for their success. Then we are anguished as she reads a letter from her son, fighting in Iraq, and we learn that the letter arrived just two days before he died.

Shaken, we reflect back to the clip of an anguished Iraqi mother. Five family members, all civilians, were killed in an American attack. The Iraqi mother cries, “Why my family?” Despairingly, she calls upon Allah to bring similar destruction on the homes of Americans.

Then, in Flint, we watch Lila grieving as she tells a homeless person that her son has died in Iraq. A skeptical woman, a complete stranger, accuses Lila of fabricating the story of her son's death for publicity purposes. Lila's unspeakable pain at this heartless personal attack is all we need to conclude that war is a hell that imposes unacceptable costs on the underclass.

The twin stories of the mothers in Flint and Iraq, spoken in the unrehearsed voices of two women separated by thousands of miles and two different religious and political cultures, is perhaps the most persuasive part of *Fahrenheit 9/11*.

It certainly challenges the uncommitted to take a stance. It may even cause some who favor the Bush Administration's policies in Iraq to question our continued military action there.

More often, Moore uses a much heavier hand when attempting to persuade his audience: he draws inferences that are intended to shock, and satirically derides the motives of those whose positions he opposes. It is a strategy that will delight the already-convinced choir. But it is equally likely to offend and dismay middle-of-the-road moviegoers who sought out *Fahrenheit 9/11* to become better informed.

Even if every charge is truthful, a derisive voice and satirical personal attacks frequently hurt the accuser more than the accused. This is an important lesson for attorneys to understand when seeking to negotiate with a partisan opponent in civil (and, often, not-so-civil) litigation.

In the opening scenes of *Fahrenheit 9/11*, several members of the House of Representatives' Black Caucus object to the disenfranchisement of thousands of African-Americans in Florida in the 2000 Presidential election. Vice President Gore asks the objectors, "Is there a single Senator who joins in your objection?"

When they answer "No," the Vice President summarily rejects the objection. A voiceover says, "Not a single Senator was willing to aid by joining in the objection."

The clear implication is that the Florida vote would have been scrutinized to determine if African-Americans were wrongfully kept from voting, if it had not been for the silence of all 100 U.S. Senators.

But this inference is woefully incomplete and misleading. No serious investigation of the allegations of misconduct in "denying the vote to African-Americans in Florida" would have been considered on January 6, 2000 by Congress.

Moviegoers are not told that, had a Senator objected, debate in each house of Congress would have been limited to two hours. (3 U.S.C. Sec 17.)

Moreover, Title 3 of the U.S. Code controls. It provides that to reject the votes certified by a state, both houses must meet separately and concurrently reject the state's electoral vote. (3 U.S.C. Sec. 15.) Since Republicans had a clear majority in the House, they would have defeated any objection to the Florida vote.

Moore's over-dramatization of the failure of a single U.S. Senator to join the objecting House members is literally truthful, but clearly misleading. Had "just one Senator objected," the only result would have been a two-hour delay in accepting the Florida count.

A moviegoer who learns the truth about this instance is far less likely to trust other information Moore provides. When he raises misleading inferences from half-truths, all he accomplishes is broadening the emotional divide between supporters and opponents of the Bush Presidency.

This may be a good technique in trying to win a partisan election, but it is poor strategy for the courtroom. Jurors do not like, and will not build a consensus for, a litigant who is seen as manipulating their emotions through partial or half-truths. In a two- or three-party negotiation, such as occurs in mediation, deceptive tactics almost always make resolution more difficult.

As litigators know, the better path is to tell a dramatic and truthful story in the voice of the victim, as Moore did with Lila Lipscomb. Allow uncommitted jurors to conclude for themselves that your client has followed a just and truthful path. The credible voice of the victim's story persuades. Exaggerated and misleading inference divides.

An effective litigator, in the courtroom or acting as an effective negotiator at mediation, must deal successfully with deceptive or inflammatory tactics.

Here are **six practice tips** I use to blunt the impact of these tactics during mediation.

One, temper passions by controlling inflammatory remarks through agreed-upon ground rules in the initial joint session. Use the mediator to obtain

early mutual agreement on the importance of speaking respectfully to each other.

Two, do not be afraid to ask that the mediation continue in separate caucus to cut off a disputant or attorney who is inflaming your temper or your client's. In separate caucus, privately ask the mediator to coach the offending participants (who may be your own client) in how to have their point heard and felt without closing off negotiations through insults and passions.

Three, use quietly persistent questions to reframe potentially misleading characterizations or inferences. State accurately (a) the facts which are agreed upon, (b) the facts about which there is disagreement and (c) the respective emotions and viewpoints of the disputants. Disputants who are able to articulate the facts and emotions as perceived by the other side are far easier to move towards resolution.

Four, request your mediator to ask each party privately whether, with hindsight, there is something that party could have done to avoid the conflict or lessen the damages. Use that information to assist each party in acknowledging their portion of responsibility for the conflict.

Five, remember that "if the disputants have not used their feet to leave, a resolution is still likely." (I have found that a display of anger is often a forerunner of the settlement that is necessary to relieve that anger!)

Six, explore in separate caucuses whether a sincere apology and a corresponding forgiveness by the other party is possible. Humanizing and understanding each other is a terrific catalyst for resolution of a dispute.

An effective litigator has already learned the skill set of persuasive advocacy and story telling. When serving as an advocate in mediation, a litigator must use the very different skill set of an effective negotiator. (Since more than 90% of all litigated cases end in settlement, negotiation skills are essential even for a litigator who never participates in mediation.)

Most settlements of litigated conflicts result directly or indirectly from the intervention of a third-party neutral: a forceful settlement judge or a skillful mediator.

I have mediated hundreds of litigated cases and filed, or approved the filings, of a similar number of litigated cases in the areas of unfair business practices, partnership dissolutions and accountings, intellectual property, construction defect and real estate disputes.

I have learned that clients are far more likely to be satisfied with their legal representation when they “buy into” a settlement developed with a mediator than when they are pressured by a judge into a settlement just prior to trial.

So, if you want more satisfied clients for the 90% of your cases that do not go to verdict, learn how to be an effective advocate both in a courtroom and in mediation.

It’s good for your client, and for you: in over 30 years of practicing law and nearly five years as a full time neutral, I have observed that satisfied clients speak highly of their legal counsel, and satisfied clients pay their legal bills!

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