

# The Art of

# M E D I A T I O N



## The Terra Museum War

by David C. Hilliard

**E**very mediation is different and can often require new tactics to resolve the dispute, but the first task of the mediator is to develop trust among the litigants. A mediator must listen for options, resolve impasses, master the art of timing, and encourage patience among the litigants. The mediation presented here may serve as a “war story,” providing some insights into strategies for mediators as well as counsel for parties participating in mediation. The experiences and methods here apply equally well in most intellectual property cases. The Terra Museum mediation generated national media attention as reporters followed each twist and turn of the case.<sup>1</sup>

### Background

Dan Terra began collecting American art in 1976. By the time of his death in 1996, he had expended \$174 million on 600 paintings and 350 drawings and prints, then worth over \$300 million. He had also created the Terra Foundation for American Art with an endowment that grew, through subsequent gifts, to \$450 million. In 1987, he opened the Terra Museum of American Art in Chicago, and in 1992, a satellite museum, the Musée d’art Americain, in Giverny, France.

By 2000, all was not well. The Terra Foundation had not diversified its endowment portfolio. In a free fall of its Mercury Financial stock, it lost \$239 million. So instead of \$450 million, it had \$211 million as an endowment for the foundation.

Moreover, the Terra Museum experienced chronic staffing problems and poor attendance. In fiscal year 2000, the *Wall Street Journal* reported the Terra Museum lost \$3.4 million on revenues of only \$652,975.

In September 2000, two of the Terra Foundation directors sued the foundation and three of its directors. The suit alleged mismanagement and a plot by the three directors to transfer the Terra Foundation and its collection of American art to Washington, D.C. In September 2000, the attorney general of Illinois intervened in the suit on behalf of the people of Illinois, asserting essentially the same allegations.<sup>2</sup>

The suit was a legal bombshell. It began a 10-month legal battle that cost millions in legal fees.

### Mediation Preliminaries

In January 2001, after four months of intensive litigation, Cook County Circuit Court Judge Dorothy Kirie Kinnaird and counsel for the parties resolved to stay the court proceedings to enable the parties to pursue mediation. Judge Kinnaird appointed me to mediate the case. Full disclosure was made that I was vice chairman

of the Art Institute of Chicago and chairman of the School of the Art Institute. As a first step, I obtained the consent of counsel for the assistance of my partner, Brett August, who speaks fluent French, as a fellow mediator. This was important because several of the Terra Foundation board members spoke French and were not fluent in English.

At the very outset of the mediation, we met with all counsel to clear up any concerns or impediments with the process that was about to begin. All counsel agreed, for example, to recuse themselves from the mediation sessions so that the directors could find a solution among themselves without interruption of counsel. Such a recusal is highly unusual, selfless, and enlightened.

The greatest challenge was the Terra Foundation trustees themselves, 11 extraordinarily distinguished individuals including the former U.S. ambassador to France and the French ambassador to the U.S., the former director of the Pompidou Museum in Paris, and U.S. Senator Alan Simpson. Because so much was at stake, the trustees appeared to the media to be dysfunctional as a group. In fact, each individual was at the peak of his or her accomplishments and intensely concerned with the well-being of the Terra Foundation and collection.

In most mediations, I recommend three preliminary best practices.

First, once it is determined that there are no legal conflicts that would preclude the mediator from serving, counsel for all parties should be sent a mediation retention agreement to avoid misunderstandings. Helpful terms for such an agreement are included in the side bar to this article.<sup>3</sup>

Second, I arrange a conference call with counsel for all parties to answer any questions and to request a *short* confidential mediation letter (typically no more than six pages) from counsel for each party to be sent to me prior to the mediation session. The confidential letter should set forth facts and arguments counsel would like me to consider prior to the mediation and suggestions for settlement. The information in the confidential letter will not be revealed to any other party or counsel. If I cannot obtain court filings online, I also request that counsel for one of the parties send me a set. A decision also should be made as to a site for the mediation most convenient to the parties. Finally, I request that a client decision maker be present for each party at the mediation.

Third, in a joint session at the outset of the mediation I explain that statements made in the mediation cannot be used in court. In my experience, opening statements by counsel for each party are seldom persuasive and often counterproductive. Normally, I recommend that counsel forgo their statements and that the parties separate into different rooms. I then caucus back and forth between the parties seeking to build a consensus on points leading to settlement.

### **The Mediation Process in the Terra Case**

To achieve a mediated settlement, a majority of the Terra Foundation board, including the plaintiffs, would need to support the terms of any agreement and the Illinois attorney general would need to add his endorsement. In the *Terra* case, because of the number of trustees and the issues at stake, the task had mathematical complexities.

To develop trust, the mediators met privately and individually with each member of the Terra Foundation board

of trustees before the board as a whole began its mediation sessions. For the individual meetings, the mediators created a matrix to map out the position of each board member on 20 issues in four categories:

- Museum and collection,
- Education,
- Governance, and
- A miscellaneous category.

The 20 issues were not identified as such but were imbedded in a free-ranging discussion so as to elicit individual reactions and, in some cases, add to our list.

Mediation ferrets out issues and solutions that go beyond the pleadings in the complaint. In the *Terra* case, money was not the issue, nor was the satellite museum operated by the Terra Foundation near Claude Monet's former home in Giverny, France. The principle issues were governance and where the foundation and its collection should be located. What should the board of the future be like? Who should be on it? Should the Terra Museum go to Washington, D.C.? If it stayed in Chicago, should it remain freestanding on Michigan Avenue or should it join forces with the Art Institute of Chicago or some other institution? All of these questions were answered in the final court order, as will be seen.

Section 5 of the Uniform Mediation Act precludes disclosure of the mediation communications.<sup>4</sup> The comments to § 5 provide: "Critically, the preclusion provision applies only if the disclosure prejudices another in a proceeding." A mediator should exercise special care to maintain confidentiality, as confidentiality encourages parties to speak candidly, which is essential to a successful mediation.<sup>5</sup> Notwithstanding the confidentiality rules, a great deal of information was leaked to the press by the parties in the *Terra* case and resulted in continuous national news coverage despite a court-imposed gag order.

We held mediation sessions every few weeks from February through June 2001. Impassioned speeches were given and angry denunciations were made, yet there was a good deal of laughter and various board members took long strolls with the mediators as the complex agreement was hammered out.

After two months, it became apparent that several board members felt the demands made by the chief of the attorney general's charitable trust division were unreasonable. But, as mediators, we had met with the division chief and knew this was not so. To allay these concerns, we asked the division chief to attend the next mediation session and answer questions from the board. This meeting helped clear the path to settlement.

Spirits began to flag again in the fourth month. Spirits flag in most mediations, even single-day mediations, and it falls upon the mediator to point out the progress made toward settlement and encourage patience. Gradually, a consensus began to emerge among the majority of the Terra board. The *Chicago Sun Times* reported on May 17th that a tentative agreement had been reached.

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### ***The Settlement Agreement***

The tentative agreement sparked a firestorm of activity.

On May 24th, the *Chicago Tribune* reported that Judith Terra had written the board and declared that she was terminating the mediation. As she was only one member of the board of trustees, however, she did not have the power to terminate.

The individual defendants attempted to hold a meeting of the Terra board outside the mediation process but were enjoined by Judge Kinnaird on June 8, 2001, with the statement that she did not think mediation "has a prayer if these meetings go ahead!"

On June 29, 2001, suit was filed in the U.S. district court by the individual defendants and the Terra foundation seeking a temporary restraining order to prevent a vote by the board on the mediated settlement. New counsel argued the case for the individual defendants including the former White House counsel for President Nixon and the former president of the Chicago Bar Association. At 10:00 p.m. on June 29th, Judge Bucklo refused to involve the federal courts in a state court action and denied the motion.<sup>6</sup> The Seventh Circuit dismissed the appeal on August 29, 2001.

A mediated agreement emerges from a process of give and take among the parties and must be drafted with precision. The final mediated agreement in the *Terra* case was approved by

the board by a vote of six to two with three members absent on June 29, 2001. A court order implementing the agreement was entered by Judge Kinnaird on July 26, 2001, after a full hearing before a packed courtroom, which lasted well into the night.

The final consent judgment and order established six principles:

1. The Terra Foundation will remain an Illinois corporation with its corporate headquarters in Illinois for at least 50 years. This provision ensured that the Terra Foundation would remain under the jurisdiction of the attorney general of Illinois.
2. The Terra collection of American art will stay in the Chicago metropolitan area by itself or in partnerships or arrangements with other institutions for at least 50 years. A specific exception is made for the Terra Foundation to loan art for display and exhibition at the Terra Museum in Giverny, France.
3. The majority of the Terra Foundation board shall be comprised of residents of Illinois for at least 25 years. This provision eliminated majority control of the Terra Foundation by citizens of other states.
4. No current board member shall be eligible to serve on the board of the Terra Foundation after the 2002 annual

## **SAMPLE MEDIATOR RETENTION TERMS**

### **I. CONFIDENTIALITY AND IMMUNITY**

Conferences and discussions which occur in connection with mediation services provided pursuant to an Agreement shall be deemed settlement discussions, and nothing said or disclosed, nor any document produced, which is not otherwise independently discoverable, shall be offered or received as evidence or used for impeachment or for any purpose in any current or future litigation, administrative proceeding, arbitration proceeding, or in any other dispute resolution forum, regardless of the law of the forum.

In particular, the Parties, including the Mediator, will not disclose to any third party any information including offers, promises, conduct, statements, or settlement terms whether oral or written, made by any of the Parties, their agents, employees, experts, and attorneys. Such information is confidential and privileged under any applicable state or federal privileges, and any state confidentiality statutes, rules, or doctrine.

Briefing Papers, materials, and other information submitted to the Mediator by a Party or its attorney, except for pleadings and other court filings, will not be disclosed to the other Party and its attorneys without the consent of the submitting Party or its attorney.

The Parties agree, on behalf of themselves and their attorneys, that none of them will call or subpoena the Mediator in any proceeding of any kind to produce any notes or documents

related to his mediation services or to testify concerning any such notes or documents or his thoughts or impressions. If any Party attempts to compel such testimony or production, such Party shall be liable for and shall indemnify the Mediator for any liabilities, costs, and expenses, including attorneys' fees and lost professional time, which the Mediator may incur in resisting such compulsion.

The Mediator shall not be liable to any Party for any act or omission in connection with the mediation. The Mediator shall have the same common law immunity as judges and arbitrators from suit for damages or equitable relief and from compulsory process to testify or produce evidence based on or concerning any action, statement, or communication in or concerning the Mediation conducted pursuant to this Agreement.

### **II. NO ATTORNEY-CLIENT RELATIONSHIP**

The Parties understand that there is no attorney-client relationship between the Mediator and any Party, and each Party acknowledges that it will seek and rely on legal advice solely from its own counsel and not from the Mediator.

### **III. DISCLOSURE OF PRIOR RELATIONSHIPS**

The Mediator has found no legal conflict that would preclude the Mediator from participating in the mediation in a fair and impartial manner. Neither the Mediator nor the Mediator's firm has represented the Parties within the last five years.

meeting. This provision sought to resolve the acrimonious relationships that had developed within the existing board and eliminate the then-existing seven to four majority control of the Terra board by citizens of other states.

5. Five new trustees were elected and tasked with choosing the new chairman of the Terra board. This provision resulted in the election of Marshall Field, former chairman of the board of trustees of the Art Institute of Chicago and renown collector of American art, as chairman of the Terra Foundation board.
6. Even after 50 years, neither the Terra Foundation nor the Terra collection shall leave Illinois without first giving one-year prior notice to the attorney general of Illinois to permit the attorney general to take any action deemed appropriate. This provision was intended to prevent a later takeover of the Terra Foundation and collection.

#### **More Litigation**

After the court order of July 26, 2001, the three individual defendants took action on two fronts.

First, they filed a second lawsuit against the Terra Foundation and its other directors seeking to have the July 26th order overturned. That case was stayed pending a final

appellate ruling on the original case.

Second, they appealed the July 26, 2001, court order as a “naked seizure.” Appeal of a mediated settlement implies an oxymoron. But, as Mark Van Buren Partridge has pointed out in his treatise on alternative dispute resolution:

The Terra case illustrates circumstances in which a mediated settlement can result in continued litigation. It was a multi-party dispute in which the mediated settlement was approved by a board over the objection of several board members. . . .

The lesson of this case is that even a mediated settlement can result in further litigation if there are dissatisfied parties. However, litigation is not likely to change the result, as a consent order resulting from a mediation or settlement is not normally subject to review. Other efforts based on fraud or coercion may be possible, but will be difficult to establish in a well-managed mediation.<sup>7</sup>

The settlement agreement was attacked, principally, on the grounds that the attorney general: (1) threatened to amend the complaint to add one board member as a defendant for breach of his fiduciary duties, and (2) initiated an informal inquiry into actions of another charity of which another board member was a member. Both board members denied that their vote had been influenced in a lengthy board meeting on June 29, 2001, which was recorded and transcribed.

On May 28, 2004, the Appellate Court of Illinois, in a 12-page opinion, affirmed the July 26th order of the trial court.<sup>8</sup> The appellate court specifically affirmed the circuit court finding that the decision of the two Terra board members in favor of the settlement was not the product of coercion:

I listened to [audio tapes of] the way the first Board member voted and what she said and how she said it \* \* \* This was a lady who was in control.

With regard to the second board member, the appellate court noted the trial court’s conclusion that the recorded tape revealed “no shaky voice, nothing at all” that would indicate a conflict produced by any pressure by the attorney general.

The appellate court concluded by ruling:

There is a strong policy in favor of settlement in order to avoid costly and time-consuming litigation. . . .

Here, the materials submitted to the trial court demonstrated the existence of a *bona fide* claim that the Foundation’s key charitable purpose was the operation of a museum of American art in the Chicago metropolitan area. As such, the defendant Directors have not shown that they would have prevailed on their claims disputing the intent of the donor of the Foundation.

Because plaintiffs’ claims are not derivative lawsuits, no judicial determination was required or made in this case relating to the “adequacy” or “fairness” of the settlement. The settlement reflected the Board’s exercise of its inherent rights to amend the by-laws of the Foundation and to govern the Foundations’ affairs. The trial court did not abuse its discretion in approving the settlement of litigation without an independent inquiry.

On October 6, 2004, the Illinois Supreme Court denied the defendants’ petition for leave to appeal.

As was pointed out at the beginning of this article, every mediation is different. The Terra Museum

The Parties and their firms have made a reasonable effort to discover and have disclosed to every other Party and the Mediator any legal conflicts or relationships not previously identified and disclosed by the Mediator.

The Parties and the Mediator are satisfied that any relationships disclosed herein will not affect the Mediator’s independence or impartiality. Notwithstanding any such relationships, the Parties wish the Mediator to serve in the mediation and the Mediator agrees to so serve.

#### **IV. FUTURE RELATIONSHIPS**

The Mediator shall not undertake any work for or against a Party regarding the subject matter of the mediation.

The Mediator shall not personally work on any other matter for or against a Party, regardless of subject matter, until six months after termination of the mediation.

#### **V. COMPENSATION**

The Mediator shall be compensated for time expended in connection with the Mediation at the rate of \$ \_\_\_\_\_ per hour, plus reasonable travel and other out-of-pocket expenses. The Mediator’s fee, and the aforesaid expenses, shall be split equally between the Parties.

mediation, however, required the mediators to address nearly every major issue mediators face in trying to facilitate agreements. The mediator must take into account the diverse, and sometimes difficult, personalities among the participants and find a way for them to work together, or at least tolerate each other.

In line with this, the mediator must ascertain the issues not clearly defined in the complaint. They will be there, and the parties must get past them in order to settle. The mediator must keep the parties on track when they threaten to succumb to failure or inertia. The successful mediator will know when and how to address these “elephants in the room” that can easily derail a mediation.

### The Trend Toward Mediation of Art Disputes

The Terra Museum mediation reflects a change in the resolution of art disputes. Previously, litigation had predominated, with a number of high-power cases.<sup>9</sup> Times changed, however, with mediation and other means of alternative dispute resolution becoming the preferred approach toward art disputes. As noted by Sarah Theurich of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center:

ADR provides flexible out-of-court mechanisms that allow parties to resolve their disputes in a neutral forum. . . . Through its less confrontational character, it helps preserve professional relationships which can be important in the art world. ADR allows parties to find mutually-satisfactory solutions, such as the conclusion of long-term loan agreements, shared ownership or custodianship, or the provision of art works as damages. The proceedings can be maintained confidential but also, where applicable, take account of public interest requirements.<sup>10</sup>

Litigation may sometimes still be a necessary first step, but stakeholders tend to look for creative approaches. In the *Terra* case, mediation enabled the parties to work out their own agreement on the moral and donor intent issues involved. In *Altmann v. Republic of Austria*,<sup>11</sup> arbitration resulted in the restitution in 2006 of five very valuable Gustav Klimt paintings that were found to have been improperly seized when the Nazis took over Austria. It is noteworthy that one of the five sold in 2007 for \$135 million, the highest price ever paid for a painting at that time. Similarly, settlement through direct negotiations have begun to resolve disputes over Italy's claims that looted Italian antiquities are in the collections of the Boston Museum of Fine Arts, the Getty Museum, and the Metropolitan Museum in New York.

### The Terra Museum Collection Today

Today, the Terra Foundation board has operated peacefully in Chicago under the leadership of three distinguished chairmen: Marshall Field, former chairman of the Art Institute of Chicago (2002–2009); Ronald Davenport Sr., chairman of Sheridan Broadcasting and chair of the Committee on African American Studies at Harvard (2009–2010); and Gerhard Casper, president emeritus of Stanford University (2010 to the present). The Terra Foundation has reinvigorated its national and international support of education and scholarship in American art.

Chicago embraced the Terra Museum as its own from the day Dan Terra first opened its doors. As the collection grew,

however, it needed a less valuable and expensive location and it needed space, context, and conservation, as well as attendance worthy of its greatness.

In 2004, the Terra Foundation closed its costly museum on Chicago's Michigan Avenue, and in 2009 closed its American Art Museum in Giverny, France, preferring to devote itself to research and helping museums with projects related to American art. In 2005, 50 of the Terra collection's best paintings and all 350 of its works on paper reopened on loan to the Art Institute of Chicago. The combined American arts collections of the two museums occupy two expansive floors at the Art Institute and constitute one of the nation's best collections of American art. As fervently wished by the trustees during the mediation, it has become an essential destination for scholars in the field of American art. ■

### Endnotes

1. *Cf. Terra Museum*, HARVARD LAW SCHOOL: ART LAW, [http://www.law.harvard.edu/faculty/martin/art\\_law/terra\\_museum\\_case.htm](http://www.law.harvard.edu/faculty/martin/art_law/terra_museum_case.htm).
2. *Buntrock v. Terra Found. for the Arts*, Case No. 00 CH 13859 (Cir. Ct. Cook Cnty., Chancery Div. 2000).
3. Adapted from ADR IN TRADEMARK AND UNFAIR COMPETITION DISPUTES: A PRACTITIONER'S GUIDE, app. 27 (William A. Finklestein ed., Int'l Trademark Ass'n 1994).
4. Uniform Mediation Act (last revised and amended in 2003), drafted by the National Conference of Commissioners on Uniform State Laws. See also Matt Brown, *Legislation: Where the Uniform Mediation Act Stands in the States* (June 16, 2010), <http://www.cpradr.org/Edit/News/tabid/45/articleType/ArticleView/ArticleID/239/default.aspx>.
5. See generally, Am. Arbitration Ass'n, Am. Bar Ass'n & Ass'n for Conflict Resolution, *Model Standards of Conduct for Mediators* (Sept. 2005), [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf).
6. *Terra Found. for the Arts v. Perkins*, 151 F. Supp. 2d 931 (N.D. Ill. 2001), *appeal dismissed*, Case No. 01 2994 (7th Cir. 2001).
7. MARK VAN BUREN PARTRIDGE, *ALTERNATIVE DISPUTE RESOLUTION, AN ESSENTIAL COMPETENCY FOR LAWYERS* (Oxford Univ. Press 2009).
8. *Buntrock v. Terra*, 348 Ill. App. 3d 875; 810 N.E.2d 991 (2004), *appeal denied*, 211 Ill. 2d 572 (2004).
9. *Cf. Howard J. Trienens & Scott J. Stone*, *LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS* (Northwestern Univ. Press 2000).
10. Sarah Theurich, *Art, Cultural Institutions and Heritage Law* (2009), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c93cf2fa-f5f6-4a64-a7d1-8hd907fd3dd>.
11. 317 F.3d 954 (9th Cir. 2002).

### Seeds Fallen in Stony Places

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subscriber information, but the court at first instance and on appeal found this did not have the effect claimed by iiNet. *Roadshow Films* [2010] FCA 24, at [508]–[555].

25. *Criminal Code 1995* (Cth) s 137.2 (Austl.); see *Roadshow Films* [2010] FCA 24, at [623]–[631].

26. *Roadshow Films* [2010] FCA 24, at [629].

27. *Roadshow Films Pty Limited et al v iiNet Limited* [2011] FCAFC 23, at [264]–[272] (Emmet, J.); *id.* at [520]–[524] (Jagot, J.); *id.* at [802]–[806] (Nicholas, J.).

28. For example, *Roadshow Films* [2011] FCAFC 23, at [182]–[211] (Emmet, J.), where his Honour also indicated that the producers should have offered to reimburse iiNet's reasonable costs of verification and monitoring and to indemnify iiNet in respect of liability for any wrongful termination of an account in reliance upon the producers' information; *id.* at [413]–[427] (Jagot, J.); *id.* at [731]–[751] (Nicholas, J.).