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A diplomatic approach towards mediation

DIPLOMACY IN MEDIATION SHOULD NOT BE SEEN AS A SUBSTITUTE FOR, OR COMPETING WITH, THE TRADITIONAL STYLES OF EVALUATIVE OR FACILITATIVE MEDIATION

Mediators are often asked about their negotiation style; whether they are evaluative or facilitative, both or neither. The foregoing inquiry usually serves as a proxy for the pivotal question that most have prior to a mediation, especially in higher value/exposure cases, i.e., can the mediator handle the challenging facts and personalities involved in the case, and *also* settle it?

While there are many factors that touch and concern choosing the mediator who is right for the particular case at hand, diplomacy is rarely the metric or benchmark used. Perhaps this is because diplomacy during a mediation, or a diplomatic approach taken by the mediator, is often misconstrued as being soft, beating around the bush, equivocating, finessing, or even a sign of indecisiveness. *Not so!*

Mediators can greatly enhance the likelihood of settlement when they use diplomacy at the right times and in the appropriate doses. Irrespective of their mediation style and approach, a diplomatically minded mediator is sensitive, empathetic, and persuasive while *also* being objective, decisive, and outcome driven.

Granted that a diplomatic approach tasks the mediator with more listening, dialoguing, patience, and walking between the parties' rooms. However, if done right, the participants' experience during the mediation is greatly improved, and the intensity and emotions that often underlie every dispute are contained and managed such that they are no longer, or are less of, a distraction. So, what does diplomacy look like during a mediation?

Smoothing out the edges

Often, positions advanced by adversaries during a mediation can be perceived as being all-or-nothing, take it or leave it, raw and unfiltered, i.e., the "being blunt" approach. Some advocates use this approach sparingly and strategically during the negotiation, and for others it is their modus operandi. Irrespective of the motivation(s) or justification(s) for being blunt during a mediation, one thing is clear: a party receiving a blunt message will likely take it as an act of aggression, or even an attempt to bully, inviting a tit-for-tat response that is just as, or even disproportionately more, blunt. A vicious cycle ensues.

When presented with blunt or matter-of-fact positions, a diplomatic mediator works to smooth out the edges of the arguments being advanced, paying close attention to not changing or diluting them, so that the message is well, or at least better, received by the other side.

For example, imagine a red-light dispute, with no independent witnesses

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and involving significant injuries. Both parties are equally credible, and each maintain their veracity and that the other party is "100 percent lying through their teeth." In an effort to smooth the edges of the blunt messages being exchanged, a diplomatic mediator would say "the party's positions appear to be diametrically opposed and thus polarizing. If presented at trial, both sides bear the risk of the jury picking a side with the understanding that no juror is a perfect polygraph machine." Nothing is lost in translation, and better yet, the parties' focus is directed away from the alleged lie and towards the probability and likelihood of the jury being able to correctly distinguish the truth from the alleged lie. In other words, the focus of the dialogue evolves from ad hominem attacks to evaluating the potential risks and rewards.

A diplomatic vocabulary and delivery

In any diplomatic effort, whether it involves solving a centuries-old dispute, or a plain-vanilla litigated case, words and their delivery matter. In the realm of mediation, words and their delivery play a focal and critical role in not only the process, i.e., how the mediation transpires, but also in the outcome, i.e., the terms of the deal if the case settles, or the mindset and mood with which the parties leave the mediation if the case does not settle.

To clarify this point, consider the wisdom derived from the adage: "kindly take a seat," "sit down," and "sit the hell down!" all relay the same intention and desired outcome. However, the foregoing words, while similar, communicate starkly different messages ranging from the polite, to the neutral, and ultimately to the rude and offensive. A mediator, especially one that is diplomatically minded, is constantly trying to frame and reframe the information being exchanged in order to keep the dialogue moving in either polite or neutral gears, even though the message that the mediator is receiving can be perceived as insulting and offensive.

So, what does a diplomatic mediator's vocabulary and delivery look like? In the employment law arena, imagine a case wherein an employee is terminated because their work product is deemed by the employer to be repeatedly subpar, whereas the employee believes that the same work product is leaps and bounds ahead of the curve. In addressing this subjective difference of opinion to which the employee takes great offense, a diplomatic mediator will shy away from an "it's abundantly clear to me" type response, instead choosing to defuse the disagreement by acknowledging that "everyone is entitled to their opinions, and I am not asking you to adopt theirs. This dispute arises from a subjective interpretation about the quality of your work which only a judge, jury or arbitrator can decide. For the purposes of today, let's focus on identifying those things about which we can agree."

In short, a diplomatic mediator understands that similar words can have different meanings, that the same word can be understood differently by different people, and that words and delivery combined can have a profound positive (or negative) effect on the outcome of the mediation. This is not to say that a mediator, diplomatic or not, should abstain from expressing their views or experiences on a particular topic. On the contrary, one of a mediator's roles is in fact to do just that. However, a diplomatic mediator will do so sparingly and only when necessary in an effort to flesh out issues as opposed to repeatedly creating a pedagogical moment between the mediator and counsel or their clients.

Going from "or" to "and"

In every mediation, the "or paradigm" shows up. That is, one side says "it's either X *or* Y" where X stands for something that is good for their case (arguably likely to occur), and Y stands for something that is bad for their case (arguably unlikely to occur). Positions based on the "or paradigm" are used to simplify a choice between two or more options or to simplify among unknown future events, and in mediations it is used expressly or implicitly to suggest that one outcome has a significantly higher chance of occurring than the other. "My MSJ will be granted, so until then, the other side can just take *or* leave our offer" illustrates perfectly how the "or paradigm" shows up at mediations.

The "and paradigm" can be best described as when two events or outcomes occur even though they are opposites and presumably mutually exclusive. For example: a Plaintiff wins at trial, but ultimately loses in the sense that the net recovery after judgment is significantly less than what the net recovery would have been had Plaintiff settled the case. That is, a win *and* a loss. Another example is: a Defendant prevails at trial, i.e., a win, but only after paying his/her attorney significantly more money than the Plaintiff's last settlement demand, i.e., a loss.

Setting aside the benefit or advantage that the foregoing negotiation technique may yield, the "or paradigm" is divisive by nature because it stands for the possibility that the two events or outcomes, X and Y, cannot both occur. Reconsider the red-light dispute case mentioned above, wherein the truthfulness of both parties is in question. Each party takes the position that the other is lying, and given their entrenchment in their respective positions, neither party stands for the possibility that the jury could in fact deem *both* parties as not credible.

Enter the diplomat who aims to change the dialogue from "or" to "and." A diplomatic mediator will roundtable the possibility that the jury could believe the Plaintiff as to one issue *and* believe the Defendant as to another issue. In doing so, the mediator has created the possibility that two events or outcomes can both occur.

Shifting the dialogue from "or" to "and" allows the exchanging of ideas to continue, i.e., it keeps the chains moving; it dissipates the sting from being presented with an all-or-nothing position, demand, or offer; and it makes the parties aware of the possibility that the outcome of their case *may* not squarely fit into *either* scenario X or Y, but rather

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arise from a combination of those two, or other, scenarios.

Looking for the next-best possibility

Most cases revolve around money. Conceptually speaking and in the realm of litigation, money is a finite resource, and as such, one party's best-case scenario is their adversary's worst-case scenario – hence the notion that a good settlement is one that neither side is particularly thrilled to accept. Seasoned advocates walk into a mediation gunning for the best possible scenario for their clients, with the understanding that they may have to consider the next-best scenario depending on the push-back they receive from the other side and/or any new developments that may arise at the mediation. A diplomatic mediator anticipates the foregoing and is always searching for the next-best possibility well in advance. Such a mediator is not dissuaded or discouraged if one next-best possibility does not work; rather, they quickly move to the next-next-best scenario, doing this as many times as necessary. Stated succinctly, diplomacy requires that one does not give up as soon as an idea or offer is rejected, but rather keeps searching for a possibility that could be accepted.

The foregoing process also requires a fair amount of creativity, resilience and persistence – none of the renowned political diplomats of our time ever gave up on their first attempt. For example, consider a fact pattern or case where it becomes clear at some point during the mediation that a payment of money alone will not suffice. What's the next best possibility, what else can be negotiated to bridge the gap? In a product liability case, it may be a safety announcement for the benefit of consumers; in a personal injury case, it may be a structured settlement; in a premises liability case, it may be a conspicuous sign or warning to prevent others from being injured; and in an employment case it may be an apology or a letter of recommendation.

Needless to say, all mediators, especially those that are diplomatically minded, anticipate the likelihood that the first or the most obvious solution, i.e., the proverbial low hanging fruit, may not settle the case, and they are prepared to try a series of "next best" possibilities until they find one that fits the bill.

Know when to be "the sage on the stage" versus "the guide on the side"

In 1993, Alison King, in the book "College Teaching," coined the phrase "From Sage on the Stage to Guide on the Side." While not written in the context of law or dispute resolution, the phrase can easily be applied to diplomacy and peacemaking. The sage on the stage can be likened to the evaluative mediator who takes charge of the negotiations, calls it as they see it, and is candid (and possibly unapologetic) if their evaluation of an issue is not shared by one or either side.

On the other hand, the guide on the side can be likened to the facilitative mediator who takes a more organic approach to the negotiations, allowing things to transpire naturally, and preferring not to unnecessarily interject their views and opinions, but rather, opting to discretely nudge things along. The diplomatic mediator knows when to be the Sage and when to be the Guide, and ideally, they know the timing in which to transition from one role to the other.

Consider a mediation wherein one (or both) of the parties have very unreasonable expectations. Despite their counsels' efforts, they are not receptive to the realities of the case. In such a case, a mediator who is diplomatically minded may first take the role of the Guide, that is, allowing the parties to express their views, engaging in a dialogue, playing the devil's advocate, etc. If those efforts do not bear fruit, or if the parties persist such that the mediation, or the progress made thereat, is in jeopardy, then the mediator seamlessly transitions into the Sage to get the dialogue back on track. Obviously, such a mediator will, as described herein, use diplomatic words and delivery, being mindful to smooth out the edges of the issues at hand.

Remaining equanimous

A diplomatically minded mediator has the ability to be equanimous, that is, being composed, especially under tension or strain, and remaining calm while maintaining the equilibrium of the mediation. Similarly, such a mediator must also remain detached from the case or any particular outcome – anything short of that means that the mediator has become entangled in the dispute, which compromises the process.

Consider a mediation wherein the mediator, serving as either the Sage or the Guide, shares a view, an idea or an experience that challenges a position advanced by one of the parties, possibly being misconceived by that party as an attempt by the mediator to undermine their position. The party reacts emotionally and in doing so, a dispute within a dispute starts brewing between the party and the mediator.

In such a situation, a diplomat quickly takes the pulse of the room and recognizes the disagreement, sets aside their ego, listens for content, and after the objecting party has been heard, the diplomat guides the conversation towards other germane or more important issues. In other words, agreeing to disagree, is still a step in the right direction. Otherwise, the negotiation becomes bogged down and muddied by the particular difference of opinions which ultimately may have no bearing on the outcome of the case.

The diplomatic mediator may allow an irreconcilable difference of opinion to exist without being drawn in to it, i.e., temporarily leaving that particular issue alone, making progress on other issues in play, and if need be returning to it. In short, a diplomatic peacekeeping effort, whether in international foreign affairs or in a mediation, will yield an optimal outcome if the diplomat or mediator is able to keep a balanced and calm process even when an emotionally charged disagreement occurs.

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Final thoughts

There are cases wherein the facts or the parties involved require the attorneys to decide whether an evaluative, facilitative, or transformative mediator is best suited for the case. This article stands for the proposition that diplomacy, as described herein, is an equally valuable method or consideration for matching a case to a mediator.

Moreover, diplomacy in mediation should not be seen as a substitute for, or competing with, the traditional styles of mediation. Rather, diplomacy during a mediation is more of a state of mind or a state of being. In fact, many mediators are de facto diplomatic both in style and in their execution, while others either consciously or subconsciously utilize one or more of the diplomatic approaches discussed herein, on an as needed basis.

Diplomacy likely shows itself in every mediation and peacekeeping effort, yet as a concept, it oftentimes goes unrecognized and remains under the radar. When diplomacy is needed, and when it is timely applied by the mediator, it creates an environment geared towards resolution and problem-solving, it garners a positive experience both for counsel and their clients (even if the case does not settle), and it significantly increases the chances of a fair and reasonable settlement.

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