

MODERN STATES CRAFT FOR LITIGATORS: THE ART OF DIPLOMACY THROUGH MEDIATION

By Jan Frankel Schau
As published in the Daily Journal

It may surprise 21st Century litigators to know that Chinese military strategist Sun Tzu famously said in "The Art of War": "the supreme art of war is to subdue the enemy without fighting".

This explains why modern statesmen engage in all conceivable diplomatic measures before taking that last drastic one and making a military strike. As a life-long student of International Relations, I am grateful that President Obama has, at least for the moment, held back on declaring war in Syria in an effort to exhaust all diplomatic efforts, (negotiate for change in an attempt to subdue an evil world leader), gain consensus from Congress (his "team"), rationally evaluate the risks attendant to a military strike (information gathering) and carefully consider the potential gains (likely outcome) even in the face of what all of us would consider to be not only "wrongs", but atrocities.

Mediation is the litigators equivalent of diplomacy. Instead of approaching your mediation hearing as a chance to put on your case and bully the other side or the mediator into getting your client the best possible "deal", why not consider some lessons from diplomats. Typically, diplomatic efforts are strategically planned and negotiated well in advance of a looming crisis. The parties deliberate about every detail: who will serve as "neutral", where talks will be held, who will attend, when will be the most opportune time to engage in talks, even the seating patterns and shape of the tables matter in these high level diplomatic efforts.

In modern mediation, the litigating parties are given the chance to do five things as prerequisite for making the decision to go to war/trial.

First, both sides to a legal battle can engage in "what if" thinking through the use of a dispassionate neutral third party. A well-prepared and experienced mediator can walk you and your clients through the analysis of all possible outcomes. For business people, this may include a spreadsheet or flow chart showing all possible turns based upon future court rulings, evidence and timing. For others, the analysis will be grounded upon jury sheets or anecdotal information about the outcome of other similar cases. Nonetheless, outside the heat of the battlefield, a mediation hearing offers a chance to engage in a rational, not emotional analysis, hypothetical negotiations and even bracketing to ferret out the most likely range of options for resolving the dispute.

Second, the mediation hearing will offer a chance for each side to tell their story

in the way that they anticipate will garner the most credibility and empathy from the trier of fact. In this way, each side can fairly consider the other's perspective and, through a third party, may consider another view altogether as well. Through this information exchange in the context of a story, each side has a chance to build some consensus about their position. From the mediator's view, it is surprising how often the parties do not begin the negotiation with consensus as to bottom line negotiations. Once the parties have earnestly engaged in the thorough analysis of the risks and listened to the other side's story, the parties are ready to look at the next phase of the diplomatic efforts.

The third step in the process is to consider the worst alternative to the negotiated agreement, the war. This is the time when both parties have to assess the enemy. Is the opposing counsel a risk taker? Is he well enough capitalized that he can afford to put on a compelling case? Is he very experienced and does he have a track record of success at trial? Do you? This consideration brings into play the "strategic walk out". Yes, diplomacy is at its core, a lot of exaltation of form over substance, pomp over circumstance. Here, the savvy negotiator may plan to ceremoniously pack the brief case, set artificial time limits, even file statutory offers or key motions to get the point across about the bottom line. It is true that sometimes the diplomatic talks fall apart and still war is avoided. So goes mediation. Do not despair!

During the course of the mediation, it is a particularly good time to consider the unknown risks of a failure to settle the case. Before deciding that further talks will be futile, consider some of these questions: Will going to trial risk angering the Judge or jury who may see your client as "the bad guy" or greedy for riches beyond their deserving? Is the trial lawyer or the decision-maker's ego standing in the way of a rational decision to resolve the case? Is it worth the expenditure for the potential savings in a verdict? When George W. Bush declared war on Iraq over certain weapons of mass destruction, did he consider that it might take 10 years to change the then reigning regime?

Finally, a long day of mediation will give both sides an opportunity to assess the potential collateral damage to each side in the event a diplomatic resolution is not reached. What will be the repercussions on the morale of other remaining employees in a violation of public policy or sexual harassment case? What will be the impact on sales of a product after a highly publicized trial on products liability where the Company finds records that the lead plaintiff was suffering from some medical condition that caused her to contribute to the negligent operation of a motor vehicle? It is only after some legitimate introspection and sometimes re-evaluation that a final informed decision to settle or try a case could be responsibly made.

War is only justifiable, according to ancient military strategist, Sun Tzu, if all potential means for subduing the enemy without fighting have been exhausted. Before you counsel your clients to take that military strike, use your mediation skills and all available opportunities to engage in diplomacy by negotiation. It may save lives and valuable resources as well as many sleepless nights.



Jan Frankel Schau is a neutral with ADR Services. She can be reached at JFSchau@ADRServices.org