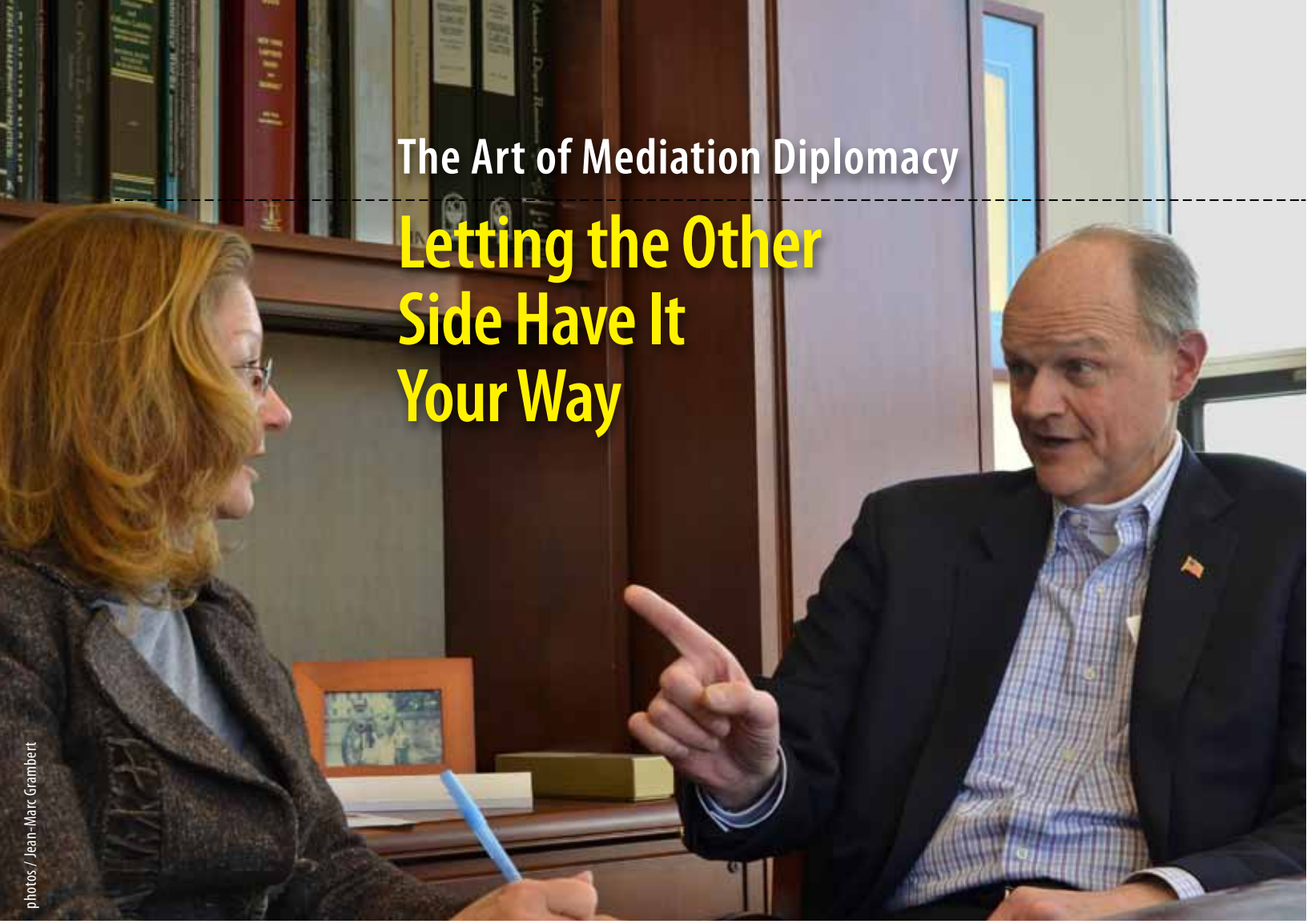

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The Art of Mediation Diplomacy

Letting the Other Side Have It Your Way

Peter Scarpato, a neutral in the National Academy of Distinguished Neutrals, and the indefatigable editor of this magazine, has been educating lawyers, company personnel, and parties to disputes about the benefits of mediation and how to get the most out of it. He is a founding Board Member of the Re/Insurance Mediation Institute, Inc., a non-profit created to foster the integrity and use of mediation to resolve insurance and reinsurance disputes. He agreed to give us his views on the state of mediation in the industry.

Connie: *Peter, what is the state of mediation in the insurance and reinsurance arenas these days?*

Peter: When you talk about insurance and reinsurance, we are considering two separate areas. For direct insurance claims, the use of mediation is stable because carriers continue to use it by private agreement or court order. Thus, for direct claims, it's pretty robust. On the reinsurance side, it is interesting because if you had asked me about a year and a half ago I would have said yes there is definitely an increase. I was receiving many calls for and had handled several reinsurance mediations. But, in the last year and a half it has tapered off. I don't really know why but I have some suspicions.

Connie: *What are your suspicions about the slow-down?*

Peter: My speculation is that after the financial crisis, companies were looking for alternative ways to resolve disputes without spending money on litigation. Now that a few years have gone by and the economy is getting back on track, there may be a return to litigation or arbitration as usual.

The number of arbitrations is also down in general. There are more existing cases settling before hearing and award. Many arbitrators have said that they have had scheduled hearings that did not happen because the parties settled at some point during discovery. Interestingly, there was a decrease in new cases perceived by everybody including lawyers and arbitrators. But, I have noticed in the last 2 or 3 months an increase in activity, possibly because of year-end.

Connie: *What barriers do you see to parties using mediation to resolve disputes?*

Peter: Before discussing several more specific barriers, I'd like to mention what I think is the most fundamental, broader barrier, and that is the parties'

misperceived expectations of the process. Unlike arbitration or litigation, the true theme of mediation can be summed up in one phrase: like the art of diplomacy, mediation is letting the other side have it your way. Simply, properly prepared parties and lawyers understand that mediation is about getting what you *really need*, not every last thing you may want, in a manner that the other side can accept. It's about evaluating every move against two sets of rules: yours and theirs. And it's about letting them know you understand and are trying to accommodate their issues while satisfying yours. Not that you necessarily agree with every one, but that you know what they are and are making reasonable proposals impacted in part by them. If parties accept this, mediation will work.

One big problem is that older, and even more recent reinsurance agreements do not have a mediation clause. So right away it's not even something that's on the radar screen. If somebody suggests it, there is the fear that they look desperate, the "white flag" effect. If mediation was automatic because the alternative dispute resolution clause required it, nobody would have that fear. I should note that the Re/Insurance Mediation Institute, Inc. (ReMedi) recently released a form mediation clause and agreement for use by the market.

But, again, even absent such a clause, people need to understand that mediation can assist both parties and increase their understanding of what the dispute is really about so that even if it does not settle, they get a better idea of what needs to be done to tailor a case to its central issues. Instead of a "white flag," mediation can be viewed as a mutually beneficial opportunity.

Another barrier is that people may have had a bad experience with a mediator. Sometimes that happens because the parties' reinsurance case winds up in court and they either get a court-appointed mediator or a judge who does not understand the business or just tries to force the parties into a settlement. Having a knowledgeable, experienced industry mediator solves that problem.

A further barrier is that people feel mediation is a waste of time with no finality since the other side will just stonewall them. Well, there are two answers to that. Number one, statistically, parties who mediate have a higher track record of settling cases either at the mediation or sometime later (before hearings) than parties who do not mediate, so clearly statistics show that there is a benefit to mediation. Also, even if they don't settle, parties can and do learn a great deal about their dispute preparing them to handle it more effectively and efficiently. Counsel and their clients can prepare in advance and refine their expectations by running "the chess game" in their mind, plotting out what is going to happen, how they are going to respond, and where they would like to end up. By developing an acceptable range or steps of numbers that they would settle for, parties come prepared and increase the chance of longer negotiations and better settlements.

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Plus, if all else fails, parties can turn to their mediator, a disinterested, knowledgeable neutral, and say: "What do you think this case should settle for?" This process of requesting "the mediator's number" can be done in a way that is confidential. Finally, you can also do a hybrid "Arb/Med" case, where the mediator first hears your arguments and, like an arbiter, makes a decision and seals it in an envelope. Then, the parties mediate with that sealed envelope sitting on the table, knowing that if they don't mediate in good faith, they are going to get this award. If they settle the mediation the award is ripped up and they never see it.

Connie: *Are companies in run-off more prone to see a financial disincentive to mediation?*

Peter: A runoff manager should look at the size of the dispute and how much is at stake and calculate with counsel the varying costs to mediate or arbitrate/litigate. If they decide on the latter, they might save money in the short term but will wind up spending more in the long term if they go to a final hearing and award or verdict. A good runoff manager performs a cost-benefit analysis and says what do I get out of this now and if I had to spend dollars now, what is that going to look like if we do not settle and go to arbitration? And don't forget the risk of spending all that money and losing as well.

Another dynamic impacting the use of mediation in runoff is that people say, well, runoff is runoff, and once the parties resolve a dispute, there is no continuing business relationship to protect by using mediation. But, while there might not be continuing ongoing business, it is probably not the last runoff claim that you will ever have with this company; you might have similar claims, or that runoff company might be involved with you somewhere else. Thus, for example, the parties can mediate and settle on an acceptable loss reporting/payment protocol that accommodates both the cedant's desire for more prompt settlements and the run-off reinsurer's need for better information and timed payments. Regardless of whether you are in runoff or active, if you use mediation to come up with resolutions that are workable for both sides, that is a good reputation to have in the business. These are things that companies should consider even if the dispute involves runoff business.

Connie: *I know that you, both on your own and through ReMedi, have been doing a great deal to educate people on the benefits of mediation. How is that going?*

Peter: ReMedi gives companies and lawyers an overall perspective about the pros of mediation, which are that it is faster, less costly, and preserves goodwill and reputation. But the most important "pro" is this: because mediating parties

The Art of Mediation Diplomacy (continued)

themselves are making the decisions and crafting the settlement terms, they have the power and opportunity to fashion a result that best serves what they need out of their dispute, including "outside-the-box" terms beyond the power of a panel or judge. *They* are in control, not some third party court or arbitration panel, where they have no seat at the table during deliberations.

With the right mediator in the middle who understands not only the business issues but also the psychological dynamics, a dispute can be seen as an opportunity not as a misfortune. *Somebody* is telling you that something needs to be fixed, and you have the opportunity to sit down with a person in the middle who can help you navigate both the emotional and substantive road blocks between the parties to resolve and fix that problem without spending hundreds of thousands of dollars.

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We are educating people on how to prepare for mediation with a settlement mentality rather than a litigation mentality. The prep includes the advance planning I previously discussed: thinking about the steps of the mediation like a chess match. What is logically going to come up, what are competing arguments, and what is your best alternative to a negotiated agreement? Develop a mediation budget that includes not just how much you might be getting or how much you might be paying to settle, but how much you also might spend to get the result you want if you arbitrate or litigate. We tell parties to have these numbers in their pocket because they may work out a deal at some point in the mediation that is better than

their walk away number, so they can make a cost-benefit comparison and a rational decision. We teach people about preparing for the dynamic of dispute tension and how you defuse that tension and focus on solving the problem, not judging the participants. So there are a series of steps to make people understand realistically how to be in the right frame of mind before sitting down at the table.

The mediator should also know when to do a reality check for each side — give them a sense of what their realistic chances of success are, what big boulders are in the way. He or she can get a party to start thinking about things that do *not* support their position because parties naturally hear and value material that supports their arguments and often fail to give adequate weight to material that does not support their side.

At the end of the process, if you settle, you want a mediator to require parties to memorialize the essential terms of their settlement in writing before walking out the door. Even if its just paper and pen with signatures at the bottom. You do not want parties waking up the next day and saying "I really gave up too soon, so forget it." If you do not settle, the mediator can follow up with the parties in a week or two and say: "I have been thinking about this and I just want to see where you are. Is there something that you want to get back together on?" A mediator should ensure the parties understand he or she is still available, that they have a vehicle to get back to talking with the other side.

Connie: *Is there anything that AIRROC could do to support mediation?*

Peter: First and foremost, with its streamlined, available Dispute Resolution Procedure, or "DRP" as it is called, AIRROC is in the forefront of supporting reasonable and effective alternative dispute resolution techniques. Beyond that, AIRROC's frequent membership and annual meetings offer a tremendous preset platform for mediation because they attract companies and members from across the globe and provide the means and opportunity to get disputing parties together in a collegial, communicative environment. This environment provides a forum for more education about how mediation works and the pros and cons of using it. For example, AIRROC did a program a few years back that I moderated at one of the membership meetings in New York where we did a mock mediation. I participated in an AIRROC educational program in Chicago in the first week of February on the DRP.

One interesting proposal we could do at the October Rendez-vous is to have mediators available so that when parties are discussing deals and resolving disputes, facilitators are available to help if they need someone to break an impasse. This would take some advance planning, but if members expressed an interest, I would be happy to work on making it happen. ●

Connie D. O'Mara of O'Mara Consulting, LLC, practices in the areas of arbitrations, mediations, and expert review. connie@cdomaraconsulting.com