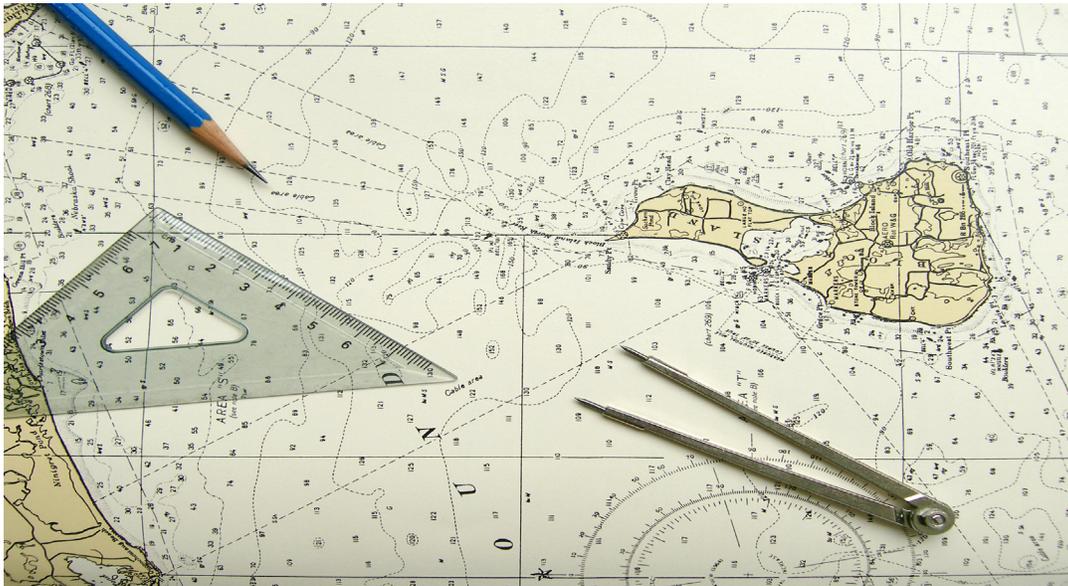


A Parallel Between Celestial Navigation & Mediation

By Giulio Zanolla, Esq.¹



As some of you may know, sailing is one of my biggest passions. Growing up in a small town by the Adriatic Sea, sailing was very accessible and since childhood, I have always been eager to get out on the water to trim sails. I often find analogies among my different interests, and comparing sailing and mediation is no exception.

Both navigating a dispute through successful resolution and accomplishing a long sailing journey require skillful planning, timely strategic choices and constant assessment of the surrounding elements. A skipper (a mediator) is in charge of steering the vessel (the process) along a favorable course, by using skills and techniques, instinct and sensitivity, and always remaining vigilant for clues in the sky and sea (from the participants and the issue and interests involved) to predict the evolution of the conditions, while assuring that all the passengers (the parties) can experience the journey (the mediation) safely and reach the desired destination (resolution).

Before GPS systems existed, sailors far from shore had no choice other than relying on celestial navigation in order to figure out where they were and where they were going. Legendary French sailor Bernard Moitessier explains that experienced sailors would always take multiple celestial observations for each position point on the chart to assure accuracy and reliability of their calculations. It was considered wise to take at least three observations in order to catch any possible errors that could mislead the sailor in regard to the boat's position and to delimit the

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area within which a vessel's position could be confidently plotted. With only two points on the chart, it is not possible to define a geographical area of certainty regarding the boat position at any given time, and accuracy would be diminished. Parties in dispute, while navigating an adversarial process such as litigation, generally rely on only two observation points: their own analysis and the analysis of the other side(s). Unfortunately (or fortunately, depending on the viewpoint), there is no "dispute resolution-GPS" to assist parties and lawyers in assessing a case and its most likely outcome with absolute certainty at any given time in the lifecycle of a dispute. A third observation point (the one provided by a mediator) may prove very valuable to assist parties in making the difficult determination of what is the best path to achieve a resolution in a dispute. It adds a dimension to the parties' analysis of the case that allows for setting a defined perimeter within which a negotiated resolution can be reached.

Furthermore, the effectiveness of counsel's advice to her clients on how to best resolve a dispute relies heavily on the lawyer's ability to accurately predict possible, and most likely, outcomes. The prediction can be only as accurate as the assessment of all the elements of the case. It is no secret that no one, even the most seasoned of professionals, is completely immune from phenomena such as confirmation bias and overconfidence. Some level of departure from absolute objectivity is normal in most cases for all parties and counsels in a dispute. By focusing primarily on one side's position and the arguments supporting it, parties and counsel may underestimate the relevance and impact of elements that are outside of their focus or just simply unknown. Consequently, a party's strategy in approaching a dispute is likely to be affected by a certain degree of overconfidence in their assessment, and even a minor imprecision may translate into dramatically suboptimal outcomes in an adjudicatory process.

Just as wise sailors would take multiple celestial observations in order to achieve certainty regarding their vessel positions and course, advocates can more effectively advance their clients' interests by integrating a third neutral vantage point in their analysis and resolution strategy. In mediation, litigants gain the benefit of additional information and analysis viewpoints that are developed and discussed during the process. A mediator's feedback is informed by the conversations entertained with all parties, and provide to all involved an opportunity to validate assumptions, verify the accuracy and increase the precision of their own assessment, and ultimately it allows the parties to explore effective options for resolution that go beyond a limited, binary paradigm of right and wrong, and win or lose.