
Kluwer Mediation Blog

Why Litigators Become Less Intelligent in Group Mediation Settings

Jeffrey Krivis (First Mediation Corporation) · Monday, July 16th, 2012

How many times have you confronted the mediator before the session begins with this question: “You’re not going to do a joint session are you? I don’t think it will be productive.” The conventional wisdom in such a request is to avoid a moot court debate in which counsel are forced to advocate strong positions that tend to push their adversaries to do the same, and don’t give rise to productive settlement talks. While there is some truth in that supposition, research into the human brain has now confirmed that when smart people feel intimidated in social settings, this can actually lead to a drop in their IQ level. It’s like a dumbing down syndrome and forces them to follow the crowd and act brain dead. In other words, traditional joint sessions in mediation can sometimes make smart lawyers behave less intelligent.

According to Read Montague, the director of the Human Neuroimaging Laboratory at the Virginia Tech Carilion Research Institute: “You may joke about how committee meetings make you feel brain dead, but our findings suggest that they may make you act brain dead as well.” His team of scientists used functional magnetic resonance imaging to investigate how the brain processes information about social status in small groups and how perceptions of that status affect expressions of cognitive capacity.

The research confirmed that there are potentially harmful effects of social-status assignments in relation to brain activity. Some people who might otherwise be high achievers with significant IQs tend to bow to social pressures when placed in competitive type situations.

One of the authors of the study, Steven Quartz a professor at Caltech said “the idea of a division between social and cognitive processing in the brain is really pretty artificial. The two deeply interact with each other.”

A classic example of this phenomenon occurs in multi party litigation where the defendants all gather together in one room to discuss apportionment of liability. Inevitably they will start talking in one voice that tends to limit the overall value they might have individually put on a case. This occurs because a large segment of the group will unconsciously flock like birds to a small coalition of informed leaders, making decisions based on the actions of others. It’s no wonder why multi party cases often take longer to settle. If the leaders of the flock tend to go in a direction that is not in synch with the flow of the case, the settlement will get derailed until new leaders step up and reverse the direction. This can sometimes take several mediation sessions before the problem is recognized.

The problem from a decision making perspective is that the smartest person in the room might have difficulty providing needed leadership, resulting in the loudest in the room taking charge. This is because not all intelligent people are comfortable in social situations, particularly multi party litigated cases. Anticipating this natural human dynamic is something the mediator can do before the session begins, either on the phone or privately in person.

An effective settlement approach in these situations is to keep the parties separated so that their IQ doesn't drop and their willingness to settle remains high. This gives the mediator the best opportunity to diagnose the real opportunities that might be available to the parties to settle through private discussions with each member of the group. That's not to say that bringing the parties together for a group discussion is not often useful to the process. It just has to be done when the competitive pressures are relaxed enough so that parties can engage and not act brain dead. This decision is best made by the mediator after interviewing key decision makers and testing the parties' tolerance for movement.

As an advocate in mediation, here's some friendly advice. Consider your comfort level for group discussions and recognize that you have control over whether to allow yourself to be put in a vulnerable position. Spend the time and effort discussing how you can be effective in moving the case toward settlement directly with the mediator in a private call or meeting. Don't allow yourself to be dropped into a process where your perspective is simply a face in the crowd. Collaborate with the mediator how you can have an impact with the crowd without having to have the loudest voice.

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