Kluwer Mediation Blog

Top Ten Miscellaneous Observations Regarding the Decline of the Joint Session in Mediation

Michael Landrum (Landrum Dobbins LLC) · Wednesday, July 16th, 2014

1. Lawyers have become so familiar with the process that no novelty or mystery remains. Like Benedict Cumberbatch's Sherlock Holmes, some are BORRRRRED before they arrive! Accordingly, they have little interest in truly working through the pros and cons of a case or exploring underlying interests to discover a solution acceptable to their clients which they (the lawyers) never anticipated. They feel they know what to expect, and – forgetting that the case is about their clients, not them – prefer to simply "cut the chase" in the least amount of time possible.

2. Lawyers want to be "in control." Some may misinterpret the mediator's *management* of the process as an effort to wrest away *control* of their client's case. Thus, rejecting the suggestion of a joint session establishes the appropriate balance of power.

3. Some also want to simply show off in front of their clients, that hostility toward the opponent or the mediator engenders client appreciation and loyalty. These folks may think that refusal to participate in a joint session demonstrates this kind of resolve, and they earn "points" with the clients by playing a game of "stump the mediator" at the earliest opportunity.

4. Some lawyers may want to prevent their clients from being exposed to the other side's observations about the vulnerabilities of their case. Reasons could include a failure on the lawyer's own part to candidly discuss the case with client. There may even be situations where the lawyer has "puffed" his/her analysis in order the sign up the client, and the plan was to "explain away" a bad result if it occurs.

5. A more benign version of 4 above can be where the lawyer is concerned that when the client is confronted with the weakness of his/her case, he/she will "lose his/her nerve" and will compromise their own interests by instructing the lawyer to settle for less/more than the target figures they discussed before the mediation.

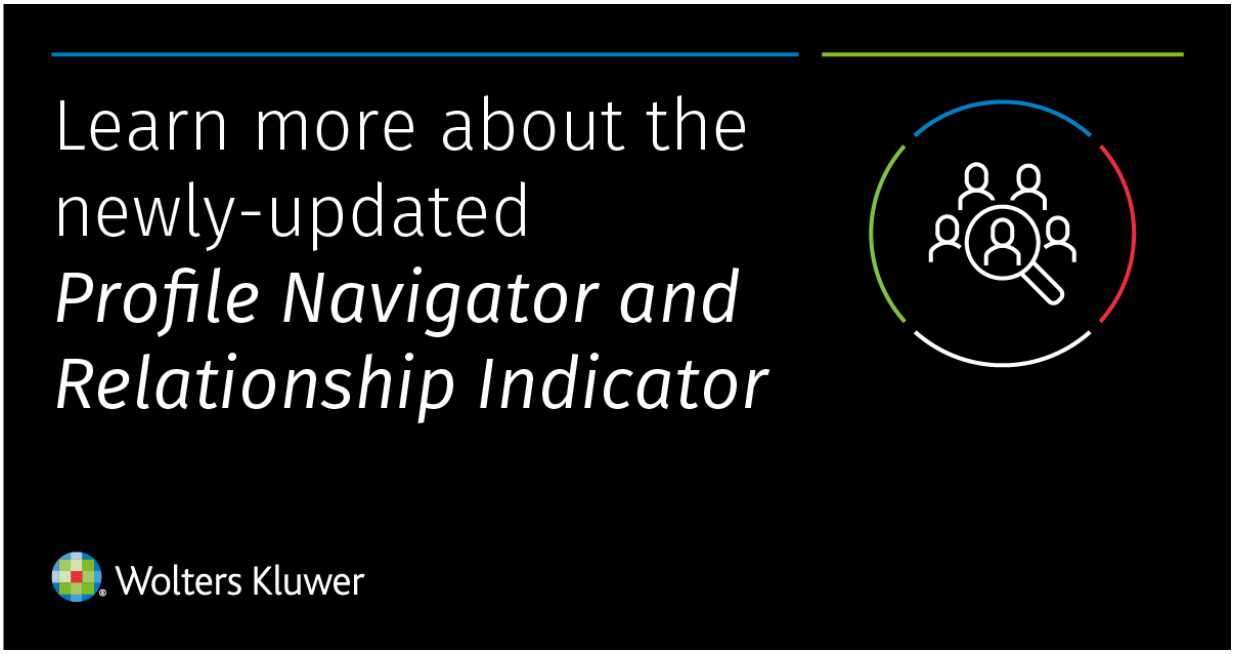
6. A lawyer representing the plaintiff in a personal injury/employment discrimination/sexual harassment, etc. case with an insured defendant (a) may assume that the insurance company has decided what it will pay before the mediation; (b) the plaintiff client is emotionally vulnerable and views the lawyer as his/her "warrior" whose job it is to protect the client from any and all unpleasantness; and (c) the objective of the process is simply to get the insurance company's top dollar on the table as quickly as possible, so the lawyer can decide whether to recommend its acceptance or rejection. Thus, the joint session serves no purpose.

7. A lawyer may have a client with maturity or anger issues, or whose emotional readiness to settle is questionable. The lawyer may fear that an exchange of perspectives on the merits of the case in a joint session could lead to a reality-show melt-down on the part of one or both parties. This dynamic may be a function of the lawyer's sense of obligation to control the process, coupled with a feeling of incompetence to deal with such a development, all of which will damage his/her attorney client relations, and make later settlement more difficult. Accordingly, avoidance of a joint session eliminates the risk. This kind of control-oriented lawyer may fail to realize that (a) the mediator likely has the competence to *manage* the process so as to avoid such a scenario; and (b) it's entirely possible that the client may want to appear to be on his/her "best behavior" for the mediator, so that (c) the probability of the feared disaster is far lower than imagined.

8. Some lawyers want to use the process not to achieve an acceptable settlement, but to stonewall and posture as a tactic for lowering the opponent's expectations. This strategy presupposes that there will be later settlement discussions, from which will emerge a better outcome because of the extreme position taken in the mediation.

9. On the defense side – especially where the "practical party in interest" is the insurance carrier, the mediation process in general and the joint session in particular may be seen as having useful, but limited, utility. The claim may well have been submitted to a committee for thorough review before the mediation, where the evidence and all available information about the client believed to be relevant have been reviewed and analyzed. This process may well have produced consensus on a final offer. Thus, the claims representative and the defense counsel attend the mediation only to determine when and how best to present this dollar amount. The claims representative has many other cases – just more business issues to be managed to conclusion – back at the office, and a joint session merely adds unnecessary billable attorney time.

10. Typically, one purpose of the joint session is to educate each side a bit about the other's case, and highlight the uncertainty of a litigated outcome. This may fly in the face of the general trend toward a more polarized society, where "principle" is a paramount value, and compromise is a moral wrong. Thus, giving one's opponents the opportunity in a joint session to present the essence of their iniquitous position is not virtuous.



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