Kluwer Mediation Blog

The Long Goodbye? Resistance to joint sessions is growing on both sides of the Atlantic. Is mediation evolving or regressing?

Matthew Rushton (JAMS International) · Sunday, August 23rd, 2015

Market resistance to the use of joint sessions is best illustrated by data from a survey of JAMS neutrals conducted in April 2015. 76% of JAMS's 300-plus neutrals responded, and the data show both a decline in the use of joint sessions, and a clear discrepancy between East and West Coasts. 80% of neutrals surveyed used joint sessions when they first started mediating – ranging from four to 20 years ago. In 2015, only 45% regularly use joint sessions. On the East Coast almost 70% continue to use joint sessions; in Southern California that figure is just 23%.

"So if you don't want to have a joint session at the start of your mediation, or you want to get talked out of it, come to LA," says Jay Welsh, Executive Vice President and General Counsel at JAMS. The reason, he says, is clear: clients don't want them. Likewise he says, "the mediator thinks that it digs a hole and makes [the case] harder to settle". Moreover, Mr Welsh predicts a trend: "the East Coast, as it often does, will catch up with the West Coast."

Moving still further east into Europe resistance is also evident – both on the part of lawyers opposing joint sessions, and from mediators pushing back against such requests. Jane Andrewartha, a London-based litigation partner at Clyde & Co and an experienced commercial mediator, illustrates the trend, "My recent experience – within the last six months – has been that lawyers have been more inclined to say, 'Actually I don't want a joint session; I think it's a waste of time.'" William Wood QC, a mediator at Brick Court Chambers concurs: "They [the lawyers] will say to you, 'Bill, we've written it all in the position papers, we've read the pleadings, everybody understands this case; let's just stay in our rooms and we'll talk turkey.'" He adds that if they do so, "the last thing that's going to happen is anything constructive."

The decision as to whether or not to proceed with a joint session at the start of a mediation day has far-reaching implications for the kind of process that will follow. On one view the purpose of a joint session is to rekindle a dialogue between the parties, which in many cases will have ceased once lawyers have been instructed. If the parties use that opportunity constructively: to explain their position, and to understand the other side's, a joint session can have the kind of humanising effect necessary for concessions that might ultimately lead to settlement. The risk in conducting a joint session however is that it has the reverse effect, and the resulting alienation pushes parties still further apart.

To try to manage this volatility, some mediators aim to limit the scope of discussion: some will

have will have a joint session but with no opening statements from lawyers; others will have a joint session but only talk about confidentiality. Others still, and in apparently increasing numbers, capitulate and abandon the joint session.

Capitulation has an immediate impact on the relative responsibilities of the mediator and the parties. Classically, mediation is "the parties' day" and they agree the outcome. Absent direct communication, the temptation may be for parties to negotiate with the mediator rather than with each other, leaving the mediator with a choice between merely carrying messages between parties, or playing a more determinative role and taking charge of the outcome. In that way, the demise of the joint session appears proportional to the rise of the mediator's proposal.

Lawyer resistance to joint sessions is by no means universal. Broadly, Ms Andrewartha notes that parties with a strong case are more willing to use joint sessions and tend to speak for longer; those with weak cases tend to resist joint sessions and have less to say if they accede. Speaking as a litigator, Tim Hardy, head of litigation at CMS Cameron McKenna (and also a part-time mediator), regards joint sessions as central to the mediation process. "When I represent a party, I'm keen to have a good long joint opening session. I will have worked out in advance what it is I want to get out of it, or what point I want to make, what questions I want to put to their witnesses if their witnesses are there – not aggressively in a cross examination way – but engaging them in a conversation." While acknowledging resistance – perhaps where one party might feel outgunned by the other – he regards joint sessions as the norm, and "helpful…to the parties to have the opportunity to express their views and to say what they think about the other party's behaviour."

Ms Andrewartha concurs: "Why wouldn't you want to speak to the other side's client? When did you, Mr QC, have a chance to look at that witness on the other side and see how he's going to perform? Why wouldn't you want to talk to him? These are things that most lawyers would recognise the value of, and I have never had a party succeed in dissuading me from having an opening session, except in cases where there was perceived physical violence."

Others have been less successful in preserving joint sessions when faced with opposition, with consequences for the mediator, but not necessarily the ultimate outcome. "I have done a few mediations recently where I've not had the joint session at all," says Rosemary Jackson QC, a mediator at Keating Chambers, "I found it quite difficult to cope with as a consequence. I've found myself doing a lot more shuttle diplomacy and for me, it hasn't been a satisfactory process. It hasn't actually adversely affected the settlement result, but I actually feel as a mediator you have to work a lot harder if there's no joint session."

She concludes that, "Litigators will use the mediation process in whatever way they consider is best in the circumstances of the particular case and their particular client." Bill Wood voices similar sentiments, while acknowledging limits on how far mediators can push back against experienced litigators: "I urge parties to get in there, make eye contact and just get the arguments back up in the air; otherwise it's going to be a very dead start. Normally I win that argument, but I don't always." Commercial factors also impinge: "No mediator is going to make a living if he goes round telling experienced litigators to be more spiritual and take a more transformative path," says Mr Wood. "And sometimes if people are toughing it out, they know what they want and they normally know how they're going to get it."

Party resistance is not the only threat to the joint session. "I think there are two things that probably could be the death of the joint session at the beginning of the mediation," says Ms Jackson. "One is

the party who, despite being told this isn't what's necessary, educates the mediator and makes a submission to the mediator as if it's the judge who's got to be persuaded, and the other party almost might not exist; I think that's a real killer. And the other is death by PowerPoint…it's almost always slides from what's already in the papers, and somehow the parties think the other side haven't read or haven't understood, and so they want to go through that. And it's a killer, and it takes the atmosphere away; everybody goes away bored."

While resistance is growing, the demise of the joint session in the UK is not a foregone conclusion, nor can it be safely assumed that the UK is on the same trajectory as Southern California, merely 15 years behind. While the UK mediation market is still maturing – and strong opinions on matters like joint sessions are an indicator of health – there are deep cultural divides between the US and the UK, notwithstanding a common legal heritage. The emotionally constipated Brits, for example, are more comfortable with a "Keep Calm and Carry On" approach to a joint session, whereas US negotiation styles can be more theatrical and therefore more volatile: staged walk-outs, more direct language, and more confrontation. The other side of the coin, which goes to the issue of the acceptability of mediators' proposals, is a culture of deference to the establishment (to politicians, and indeed judges) which is alive and well across the US, but which died in the UK decades ago.

Talk of the structural dismantlement of the mediation process is overblown: mediation is evolving in response to users' perceived needs. Both the UK approach and the US approach raise questions about party autonomy; the former when insisting on joint sessions and the latter in imposing settlements. Neither owns the moral high ground: both generally arrive at a destination acceptable to the parties following a culturally appropriate journey.

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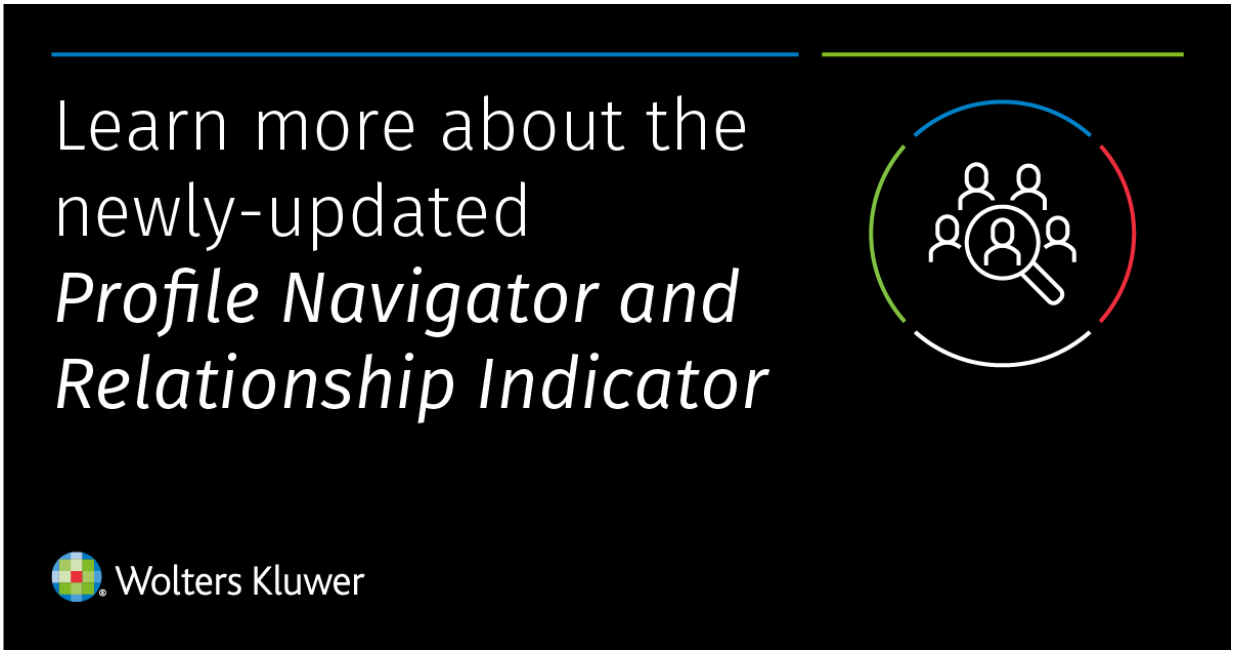
The above commentary is taken from a seminar hosted in London by CMS Cameron McKenna and JAMS International for the State Bar of California on 23 April, 2015. The participants were Charles Gordon (chairman), William Wood QC, Tim Hardy, Rosemary Jackson QC, and Jane Andrewartha.



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