Kluwer Mediation Blog

Don’t Sit On Your Ass[ets] – Part 2: The Arguments

Bill Marsh (Editor) (Bill Marsh Mediator) · Tuesday, June 4th, 2019

This is the second in my short series on using your assets well in a mediation. The first was on the people. This is on the arguments.

Let’s start with the legal arguments.

As a mediator, I hear many views on the importance or not of deploying legal arguments in mediation. Proponents assert that if you have strong arguments, they should be fully aired in mediation in order to drive home the strength of your position. Opponents maintain that “we all know the well-rehearsed legal positions, we are here to do something else”, “it’s not a mini-trial but a commercial discussion”, etc.

Unhelpfully (for present purposes) both can be true. But if legal arguments are to be substantially debated in mediation, then I am sure of two things:
1. It needs to be done well; and
2. The discussion will at some point need to move on from that subject, and ideally without a disproportionate amount of mediation time having already passed.

Turning to the first point – doing it well – I would offer some observations based on listening to thousands of examples over the last 30 years.

First, poorly articulated legal arguments will undoubtedly undermine your negotiating position, even if the arguments themselves have validity. This often means that simplicity is key. As Einstein put it “If you can’t explain it simply enough, you don’t understand it well enough”. Lawyers who deeply understand their case are invariably the most impressive at mediation, possibly as a result of saying less, but saying it well. The best example of this which I ever witnessed was in a mediation some 25 years ago. An opening plenary session in a negligence case involved some short but very clear and well-judged articulation of arguments by both sets of lawyers, with the parties themselves wishing to say very little. When I joined one party in their private room after that meeting, their lead negotiator said “I had no idea the arguments against us were so good!”. That effect has been achieved by the opposing lawyer in less than ten minutes of polite, thoughtful commentary, and it influenced that side’s entire approach to settlement.

Since the purpose of making our arguments is both to achieve clarity and also to influence the listeners, it is profoundly important to think about how arguments will be best received – not just by opposing professionals, but by the lay people present who are of course often the decision-makers.

And of course, as the above example makes so clear, the true measure of the effectiveness of your remarks is not how good you feel about them, but what the recipients are talking about when they speak amongst themselves in private.

Second, the message is too often lost in the tone. Tone is a strange and subtle thing, which perhaps attracts too little attention when preparing. Too often I have observed an effective message fall on deaf ears because the tone was ill-judged. It might have been patronising, rude or angry, but those are the easy ones to spot. More subtly, it might just be read from a prepared script, without any genuine attempt to engage with the listeners, thus conveying either boredom or disdain. By contrast, a tough message delivered politely and clearly will not allow the hearer to complain about the tone, and so will more likely require them to engage with the content.

Third, what I call the "reciprocity of listening" is vital. If you want to be heard, then listen when other parties are speaking. This sounds so basic and obvious, yet it is astonishing how often it is not done. Listening conveys respect to the speaker, which in turn engenders respect for the listener. People who are respected because they listen will have more influence when they speak.

And by listening, I do not of course simply mean hearing the words while thinking of a rebuttal – a temptation I have often experienced! I mean conveying that you are genuinely wanting to understand, even if you disagree. By contrast, the sotto voce "tut", raised eyebrow, laconic smile or gentle shake of the head is hugely tempting, but generally unlikely to get you a good hearing!

Underlying all this is a fundamental question which all parties and advisers who attend mediation need to ask themselves – have you genuinely come to "learn", or merely to "teach"? The answer to that will often significantly impact the outcome of your mediation.

Reading this, you may be tempted to conclude that I think that mediations should be erudite, articulate affairs, with no place for passion. You could not be more wrong! The "arguments" to be deployed are not only legal ones. Parties may well want, and perhaps need, to express the true extent of their anger or other emotions. As well as benefitting the speaker, it may well be an appropriate way to convey truth, and perhaps to influence others in the room. The issue for advisers is *how* to manage this to best effect. Crucially, how can it be done in such a way that it adds to, rather than detracts from, the overall impact?

Importantly, judgement calls of this kind are unlikely to be best made on the spur of the moment. Effective use of the mediation process requires serious preparation. What will influence another party? How is that best conveyed? By whom? To whom? And in what context or meeting format? While these are questions which mediators have to reflect on, advisers also need to if their client's best interests are to be served.

I have lost count of the number of times I have witnessed mediation rooms transformed by things like passion, integrity, obvious openness, courage, commercial rationale and opportunity, and sheer human decency. These have a power to influence far beyond our usual assessment of them. They may not always play a role in mediations, but we should at least look for the opportunity.

Finally, a word about "moving on" from the legal arguments, the second of my two points at the start. Whatever your views on the pros and cons of deploying legal arguments in mediation, there comes a fairly obvious point in most mediations where that discussion has run its course. That does not mean it was a waste of time. Allowing parties and advisers to articulate and discuss their respective arguments can be valuable – but it is unlikely *of itself* to generate settlement. Usually,

"agreeing to differ" is a more likely outcome. So however wedded you are to your arguments, my encouragement is to address them effectively (if you choose to) and then to move on to a different discussion. The former is about clarity and influence, the latter is about judgment calls, risk and resolution. Let us not confuse the two.

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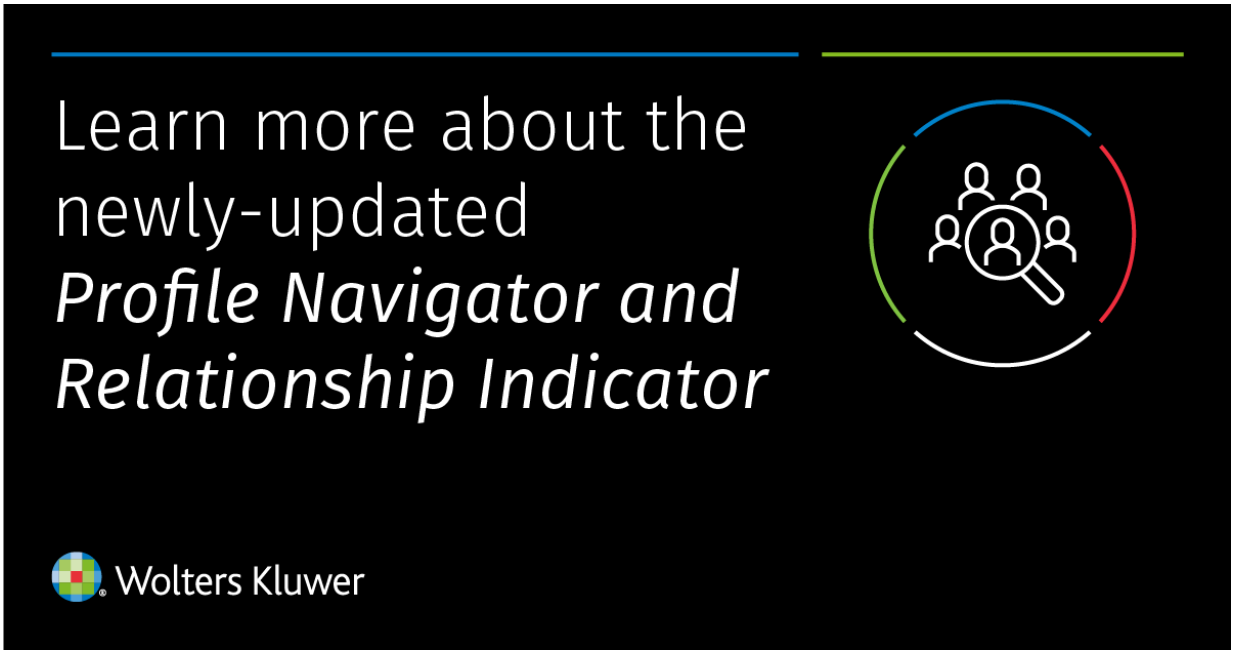

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