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Jeff Trueman's Study on Nightmares of "Positional" Tactics in Mediation

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JEFF TRUEMAN'S STUDY ON NIGHTMARES OF "POSITIONAL" TACTICS IN MEDIATION

OCTOBER 4, 2020 | JOHN LANDE | [LEAVE A COMMENT](#)

Jeff Trueman, an experienced Maryland mediator, wrote an [excellent article about the challenges of lawyers, mediators, and insurance claims professionals in mediation](#).

He interviewed subjects about their problems in mediation, and his study provided evidence of professionals behaving badly, very consistent with my post about [BATNAs and the emotional pains of "positional negotiation."](#) He specifically asked about challenges, so this study doesn't represent the full spectrum of behavior in mediation, which often works much better than subjects described in these interviews.

This insightful qualitative research demonstrates that [you don't have to be a social scientist to produce valuable data](#).

Many of the cases in his study involve insurance, which are supposedly money-only cases because the parties generally haven't had a prior relationship and have no interest in a future relationship.

He found that emotions and relationships actually can be very important in these cases – the professionals' emotions and relationships with each other.

Here's his summary of what he found in his interviews about conflicts "across the table":

Participants say that they want to cooperate and trust each other, but they engage in competitive steps to prevent this, such as withholding critical information from the other side, overconfidently predicting their success at trial, and misleading their counterparts as to what will resolve the dispute.

They claim to want fewer frustrations for themselves and, at times, their opponents when bargaining, but they posture and fend off meaningful moves from party opponents.

Plaintiffs say they want meaningful responses from opponents, such as a "real" offer, for example, but they fail to make "real" demands, and they make misleading moves in response to decent offers.

Defendants say that they want realistic demands, but they fail to make realistic offers, and they take advantage of plaintiffs when decent demands are made.

Lawyers marvel at magical, miraculous developments in mediation, but they criticize processes that bring them about.

They want to achieve good results for themselves and their clients, but they do not want to invest the time and effort.

Mediators wish more "good" counsel existed. Lawyers wish more "good" mediators existed, but they are reluctant to consider mediators who are new to them – even if the mediator is reputable.

He reported on conflicts between parties and their lawyers, "behind the table":

A common challenge reported by attorneys is managing client expectations. Although attorneys expect each other to posture during settlement talks, clients do not perceive the rhetoric as posturing; they take it at face value. As one attorney put it, "that's why we need a good mediator – to help me and my clients save face." ... [C]ounsel and adjusters are frustrated by mediators who are unable to readjust everyone's expectations and generate movement.

...

Many plaintiffs' counsel ... admit that they need to thoroughly explain the "best" and "worst" alternatives to trial and keep clients focused on their particular case, not outlier results cited by friends and family. Finally, plaintiffs' attorneys recognize the need to instill patience in their clients and prepare them for "insulting" offers and impersonal "number-trading" typical of distributive bargaining.

...

Adjusters can be frustrated by the roles that defense counsel want to play in mediation. One risk manager puts it this way, "We may disagree with our own lawyers on value and whether the case should be tried. Our own outside lawyers want to control too much."

...

According to one responding attorney, many adjusters do not have a legal background, do not observe jury trials, are expected to meet or exceed numeric goals, react personally to plaintiffs' counsel and the mediator, and withhold settlement authority if the mediator is perceived to be too cozy with plaintiffs' counsel.

I was very interested to hear more about what Jeff found, so we had this 50-minute [zoom conversation](#), which I think you will find very enlightening.

He emphasized the importance of trust between counterpart lawyers (aka "opposing counsel"). I have suggested [ways for lawyers to get good results for clients by building good working relationships with counterpart lawyers](#),

He recommends that mediators identify and address the "heart of the problems" in each case, what I have called being a "conflict diagnostician."

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