Kluwer Mediation Blog

The Diminishing Shadow of the Courthouse

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The economic challenges facing society have finally hit the civil justice system. Courthouses have seen huge cutbacks, and San Francisco has all but shutdown civil jury trials. No one thought this was going to happen to such a venerable institution as the jury system, but in these difficult times, nothing is sacred. Reduced budgets translate into cases taking longer to wind through the system, frustrated clients and a push into a private justice system.

For me, this is like 'Back to the Future.' When I first began practicing law in 1980, it was common for cases to take five years to get through the court system. In fact there are statutes on the books which mandate that civil cases be tried within that time frame. If not, the case would get dismissed. This culture led to inertia on the part of both the plaintiff and defense bar. Though the plaintiff bar preferred an early resolution of a case, the net result of pushing for early resolution was a discounted value by the defense. The defense, knowing that there was no pressure from the courthouse to move the case quickly, was more reactive than proactive. I know first hand as my first job as a young attorney was with a defense firm.

In response to the lethargic nature of case management in the early 1980s, the court in my jurisdiction (Southern California) decided that alternatives to the civil justice system would be helpful in moving cases forward. The first alternative suggested and implemented was court ordered non-binding arbitration. This was a system in which members of the bar would volunteer as neutrals and serve on cases ordered by the court. Sometimes the court actually paid the neutrals $150 per case and a cottage industry was born. Parties would actually prepare for the case as if it was the final moment in the development of the case, presenting a strong position to the arbitrator with the hope of winning. The arbitrator would issue an award which was often accepted, resulting in a closed file for the courts. If the award was rejected, either party could file a request for trial de novo and have a regular jury trial – within five years of the filing of the complaint.

Over the years, parties started to marginalize the arbitration process. By that I mean that less effort was made in preparing and putting on a serious case, mainly because it was non-binding. While this might have something to do with economic factors, my sense is that we started taking the process for granted and it became less effective. Statistics on successful arbitrations plummeted and the courts began to phase the program out in favor of other measures. Currently arbitration in our civil justice system is a dinosaur.

As the effective use of arbitration diminished, the courts decided to try something new. This time they called it 'Fast Track.' This process put pressure on the judges to force a case through the

system within twelve months. Judges soon became glorified clerks administering justice based on stop watches instead of fairness. Judges were graded on how fast they could administer a case. Low grades resulted in less appealing judicial assignments. Parties who would normally consider settlement ramifications before spending litigation dollars were compelled to take depositions and incur huge expenses in order to comply with tight court time constraints. While plaintiffs were able to achieve early resolution, the pressure on litigators was immense. Fast Track continues today but is being eroded by budget crisis and exceptions for complex cases.

Partly due to the existence of Fast Track, and partly a result of a desire to have more control of their destiny, litigators embraced the idea of non-binding private mediation in the early 1990s. The trend began in Florida and Texas in the 1980s with legislation mandating that all civil actions go through a mediation process before trial. California endorsed the trend and mediation became a cottage industry. The courts nominated volunteers to serve as mediators, and private judges and attorneys joined forces to create private mediation and arbitration centers throughout the state. Court ordered mediation began like gangbusters but became marginalized in the same way court ordered arbitration failed. Lawyers stopped preparing seriously for the process, many cases were scheduled before they were mature, and some of the mediators were just not qualified to settle a litigated case. The statistics on successful resolution went down but the court still embraces the process today, probably because there are no alternatives. Private mediation has done much better, with many parties choosing a private system where they know and trust the mediator, and can manage their dispute more efficiently without court intervention. Unfortunately private mediation has also become diluted by the number of unqualified mediators in the field, as well as the spillover effects of lack of preparation emanating from court ordered mediation. The one thing that has fueled private mediation to stay successful is the shadow of the courthouse hanging over each case. When there is pressure on the parties to go to trial, decision makers pay attention and good faith settlement negotiations take place. Without that pressure, private mediation could be doomed to become similar to an old cover of Field and Stream magazine entitled: ‘New Game Laws – The Allure of the Decoy’. Like a duck decoy that is used in hunting, mediation will be available as a distraction to litigators but clearly not the prey for hunting.

In order to properly navigate these tough waters, litigators might consider some sobering concepts:

(1) We need reasonable access to the jury trial system to create a balance of power and maintain fundamental fairness in resolving disputes. Plaintiff and Defense trade associations would be well served to lobby the legislature as a joint group. Failure of the system of justice to work in a balanced way could disrupt many parts of society as a whole;
(2) Volume style cases ranging from garden variety employment matters to automobile cases should consider agreeing to the ‘one day one jury’ approach. The parties could stipulate to the foundation of most evidence and have an abbreviated trial. This is another new attempt by the courts to administer justice fairly and should be considered by these types of disputes;
(3) Some marginal cases might not be accepted by lawyers, which means that people who would like justice, even though their dispute is small, might not get it. This is a reality of a system that denies jury trials due to budget constraints. Lawyers are in business too, and taking tiny cases will likely go by the wayside.

All is not lost, however. The silver lining in this crisis is that lawyers will rethink how they approach the use of mediation. Instead of simply putting every case into mediation with the hope of settlement since the shadow of the jury trial was hanging so low over our shoulders, parties will ‘convene’ cases so that the time is well spent and the parties can actually obtain a settlement or at

minimum a clear idea of what the financial opportunities are and how they can be achieved. The concept of ‘convening’ is well known to the mediation community but less clear to litigators. When mediation first became institutionalized, the first thing that was done was to convene the parties to the table. This meant that parties had to actually express a desire and willingness to negotiate with their adversaries. We have taken that desire and willingness for granted for many years. Now is an opportune time to take it back and turn the disadvantage of the budget crisis into advantage.

Convening is more than simply a concept or word. It opens the door for advocates to explore ways of communicating with each other early in the case to size up a willingness to come to the table. It also allows for the use of mediators early on to help in ‘bringing parties to the table.’ No party or mediator wants to engage in a mediation which is not intended to be productive. By convening the case, litigators can pre-qualify whether investing in a private mediation will be useful or not. Here are a few tips that might be considered in convening a litigated case:

(1) Organize an effort through the court system that initiates a request to determine if the parties think private mediation might be useful. This allows the parties to save face and not look vulnerable in reaching out to their adversary;
(2) Offer to negotiate provided there are preliminary talks with or without a mediator to determine whether a full blown mediation would be worthwhile and that the timing is right;
(3) Offer to exchange mutual risk analysis with your adversary before agreeing to come to the table in order to determine how far apart you might be;
(4) Utilize the services of a private mediator to convene a case by calling each side and assessing their willingness to fully engage in meaningful settlement negotiations. Parties might be more willing to share their objectives to a mediator in a pre-mediation setting then to share them with you;
(5) Sit down for coffee with opposing counsel if you have a decent rapport and talk about what direction their principal intends to take the case;
(6) Find out if there are any legal issues which opposing counsel needs adjudicated before serious settlement discussions take place;
(7) Determine if there is any additional information is needed by your counterpart before negotiations can occur;

In short, ‘convening’ allows for each side to make an independent assessment of the impediments to settlement. By learning what those impediments are, you can then determine if the case should stay on the slow track toward trial or an accelerated mediation fast track. Don’t allow the budget crisis to turn your practice upside down. Look at this as an opportunity to refocus on better ways to engineer a case toward settlement instead of being on automatic pilot.

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