Kluwer Mediation Blog

Hanging On The Telephone: the future of mediation?

Charlie Irvine (University of Strathclyde) · Saturday, November 12th, 2011

One of the privileges and perils of working as a mediator in Scotland is that we get a close-up view of developments in England and Wales. In an ideal world this should allow us (pop. 5 million) to learn from them (pop. 55 million): to pick the best innovations and avoid the failures. As I have hinted before in this blog, it doesn't always work that way, and it can feel as if the words 'this works in England' are a positive disincentive for government and judiciary. I suspect that 'confirmation bias' is at work here. This is the phenomenon whereby we can examine new data and find that it supports the position we already held (see http://www.sciencedaily.com/articles/c/confirmation_bias.htm for a brief summary). Putting that aside for another day, I'd like to draw attention to another innovation from England and Wales. It clearly works, but also raises challenging issues for mediators and the justice system.

I recently attended training in 'telephone mediation' delivered by two members of Mer Majesty's Court Service (HMCS) Small Claims Mediation team. Over 99% of their mediations are conducted over the telephone in an hour or less. I didn't know what to expect because my own mediation tradition places great emphasis on the face-to-face encounter and it is always hard to imagine what you haven't imagined. What I saw was fascinating. The 25 minute demonstration displayed the full repertoire of mediator moves, delivered with skill, speed and pleasantness. It was like watching a stripped-down, slicked-up commercial mediation without the posh accents.

Realising that commentators who deliver unalloyed praise lose their credibility, I need to justify my positive reaction. So what did I see? (Or rather hear – the demonstration was carried out by two people sitting back to back. In real life the mediator uses a standard telephone and calls one party after another throughout the hour.) The introduction was textbook. It began with nice, normal get-to-know-you greetings, followed by an explanation of mediation, its purpose (using the key word 'settlement'), confidentiality and without prejudice, authority to settle, independence of the mediator, the status of any agreement and, of course, the fee. Then the mediator used my two favourite opening invitations: a 'brief overview of what it's about' and 'what you're hoping to achieve'.

Tying this to mediation theory it struck me that, in these ultra-brief mediations, the introduction is where mediators are particularly likely to employ a technique known as 'anchoring.' 'Anchoring and adjustment' is another psychological observation, that our first impression on a given subject 'anchors' our subsequent thinking (see http://changingminds.org/explanations/theories/anchoring_adjustment.htm). It takes a degree of effort to 'adjust' our thoughts away from the anchor. Salespeople know this technique well. When

mediators drop the term ‘settlement’ into the introduction, the parties are more likely to view this as the purpose of the conversation. Other examples of mediator anchoring include the observation that mediation has a relatively high success-rate, that it can be done in an hour, and the focus on hopes for the future rather than problems from the past.

Once the mediation started I witnessed core mediation skills and techniques. There would be an open-ended question; listening (peppered with minimal encouragers like mmm and uhuh); a clarification; a more focused question; a closed question (‘Anything in writing?’); a longer summary (‘My understanding is…’); another closed question about expenses. This was tailed by the ‘classic’ commercial mediator moves: ‘Is there anything you want me to pass on at this stage?’; what I won’t disclose; ‘I’ll use the same process with the defendant’; and a final piece of priming: ‘In the meantime I’d like you to think about what you might offer.’ All of this took about six or seven minutes.

A similar approach was used with the other party. We saw listening, reflecting, offer and counter-offer, as well as a very clear ending. There was even a wee moral lesson for the parties ‘maybe find out what the costs are next time you enter into a contract.’ Lest readers think I was seduced by a particularly impressive demonstration, the statistics are impressive too: a settlement rate of around 70%, satisfaction at over 98% and an almost miraculous compliance rate of 99-100%. The scheme delivered over 10,000 mediations last year and aims to increase that number in the year to come.

This is an admittedly brief snapshot of the ‘telephone mediation style’. But its very simplicity raises nagging questions for both mediators and litigators. First, for mediators, the relative success of this minimal intervention begs the question: how much of the ‘standard’ mediation model is truly essential? Most of us like to meet people face-to-face: but if it doesn’t significantly increase the settlement or compliance rate, could we omit this step? From the client’s perspective, any advantages of being together in the same place can be offset by its drawbacks: it adds travel time; it requires accommodation; both of these add costs; and, most significantly, in small claims it is rarely the client’s agenda to meet the other party. It tends to be the mediator who holds out for this, like a doctor saying ‘this medicine won’t taste very nice, but it will help you’. Most clients, according to our telephone mediators, were relieved not to meet the other party. I also wonder whether the lack of physical proximity reduces people’s emotional arousal, helping to maximise their cognitive capacity.

Another mediation sacred cow is time. Many of us, and I include myself, dislike being rushed. My sessions can last anywhere from one to seven hours. I know of commercial mediation sessions that have taken 15 hours or two or three days. But again I wonder if it is mediators who anchor themselves at these timeframes. Telephone mediators say the session will take an hour, and it does. Of course these are small claims, with a maximum value of £5,000 (about 6,000 Euros). Perhaps they are not that complicated. However, monetary value is not the same as importance and these are often highly significant conflicts. The fact that so many settle in the time allotted should be a serious challenge to the rest of us.

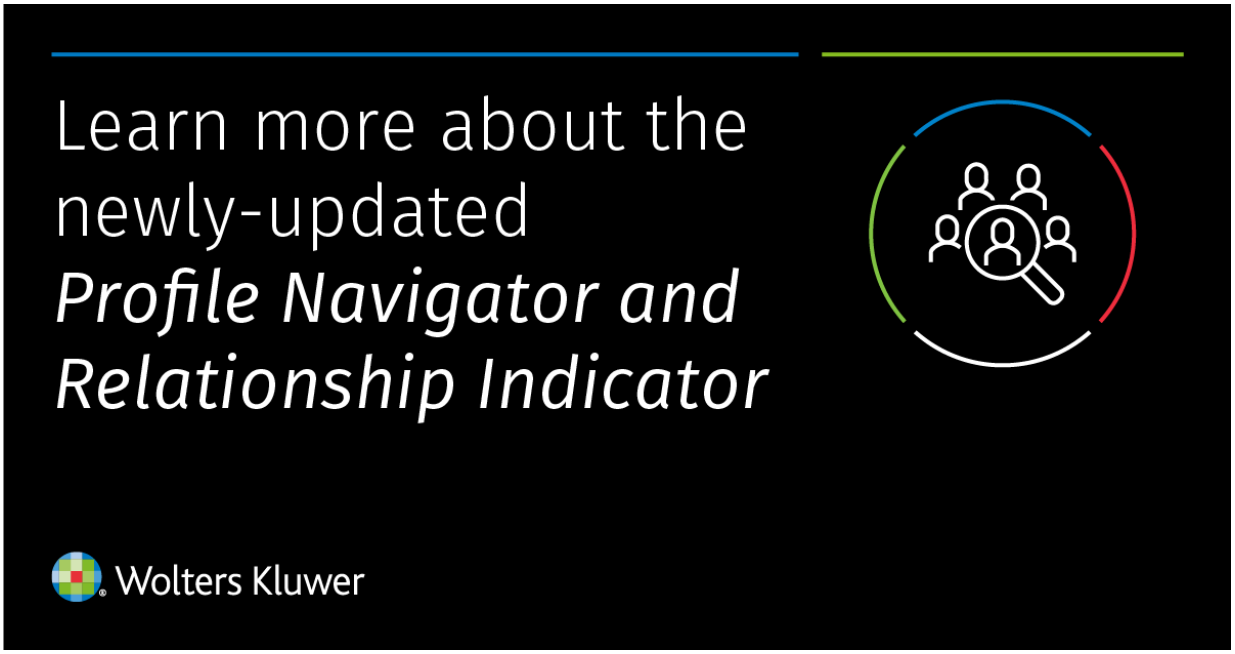
One final thought on mediation concerns skills acquisition. Sports and instrumental coaches know that, in order to attain a high level of skill, numerous repetitions are needed, ideally on a daily basis. This may be less of a problem in larger jurisdictions, but in Scotland many trained mediators simply don’t get sufficient repetition to build the effortless competence of a true ‘artist’. These telephone mediators, by contrast, had both conducted over 2000 mediations in the last four years. It showed. It is a controversial suggestion, but might it be better to develop a small number of highly

skilled mediators doing high volumes of work than have a much larger number of averagely competent practitioners doing a few cases per year?

If these features of telephone mediation are a challenge to mediation, how much more to the court system? One of the most enduring critiques of mediation holds that it is ‘second class justice’ because it deprives people of what they most want: an authoritative judgement. And yet when pressed on this question, the telephone mediators’ explanation for their impressively high satisfaction ratings was precisely that their clients had avoided the ordeal of a visit to the court. What if clients would rather avoid their day in court and instead sort things out over the telephone? Where would that particular piece of people-power leave the justice system? And when it comes to cost (about £100 per case), speed (top to tail in an average of five weeks), simplicity (an hour on the phone to a helpful person who is focused on a solution) and compliance, telephone mediation seems effortlessly superior. It is the courts that start to look like second class justice.

The word count prevents me from pursuing this line of thought, but I believe that profound issues underlie all of the above: what is justice? And as Carrie Menkel-Meadow put it, ‘Whose Dispute is it Anyway? (1995, Georgetown Law Journal 83: 2663). If people with claims of modest value discover a speedy, inexpensive, convenient and humane means to resolve them, why would they choose any other way? I appreciate that my impression of telephone mediation may be a bit rosy. There are some worries: mediators becoming burned-out through sheer numbers, becoming blase towards clients, or simply losing their motivation. No doubt others will think of more.

Whatever, this glimpse over Hadrian’s Wall at practice in England and Wales has shaken some of my certainties. It remains to be seen whether other governments will adopt this approach. But it is hard to imagine the future of dispute resolution without it.



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