Kluwer Mediation Blog

The Closure Code

Jeffrey Krivis (First Mediation Corporation) · Monday, January 16th, 2012

Civil trial lawyers have been testing new techniques to persuade since our constitution authorized the right to jury trials. In the past several years, trial consultants have encouraged use of various strategies ranging from improvisational acting, psychodrama to the current 'reptile' approach. The reptile approach is highly effective in that it challenges people to make decisions in the part of their brain that is not simply driven by emotion or reason, but a deeper section that involves the instinct to survive. Lawyers utilizing this approach seem to have obtained larger damage awards then in the past. The reasons for the larger awards seems to be because jurors, arbitrators and judges:

(1) are being asked to protect the broader community against the lack of safety involved in the incident;
(2) like to root for a cause that extends beyond the four corners of the courtroom;
(3) have a sense of urgency when it comes to the issue of survival.

Historically the reptile name comes from that part of the brain that is similar to the brains of reptiles, which have not changed in millions of years. This part of the brain focuses on our most basic human instincts: the desire to survive and reproduce. Without these instincts our species would become extinct. Such an instinct is more powerful than the other key functions in the brain, namely, the cortex (learning center of the brain) and the amygdala (dealing with emotions).

By connecting with the decision maker's strong instinct for survival, the outcome of the case will be clearer and easier to understand. For example, in routine product liability cases, the concept of justice is equated with community safety. Trial lawyers focus on the idea that when a person sees a survival danger, they protect themselves and the community by issuing a large damage award. In other words, to provide justice is to enable the jury to protect the community. This gives the decision makers a sense of self -importance and what some commentators have referred to as 'bragging rights.'

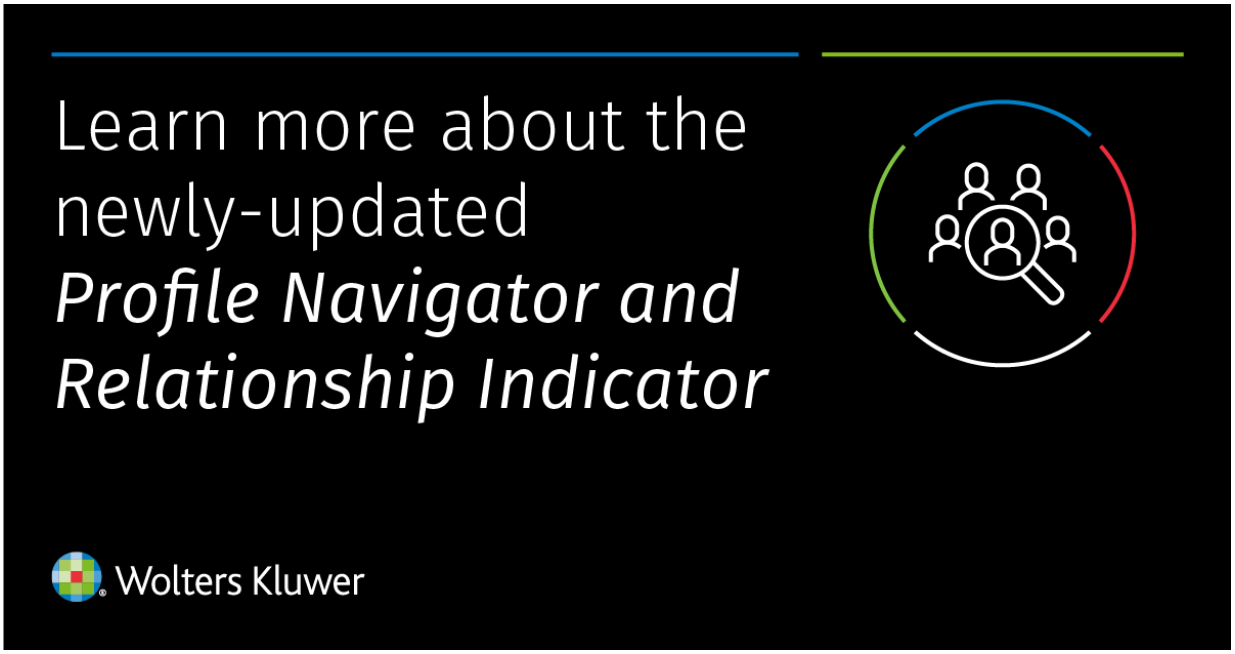
These concepts apply equally to negotiation and mediation as it does to trial. For example, an insurance adjuster usually prices a file before attending the mediation, and has a certain amount of authority granted by a higher authority evaluator. Trying to push the adjuster past the authority level will necessarily kick in the survival instinct such that the negotiation or mediation could deteriorate since the adjuster doesn't want to lose his/her job by offering too much money. On the other hand, using the mediator to better understand the pressure the adjuster is under would make it easier to determine whether having the mediator maintain the negotiation in an open and fluid fashion is worthwhile so that the adjuster can check with the powers that be to see if more

settlement authority is available. Blaming the adjuster for not being prepared with proper authority will serve no useful purpose but to force their reptilian instinct to protect their position.

Author and marketing expert Clotaire Rapaille has examined these ideas in 'The Culture Code,' a short book which focuses on helping companies understand why their customers choose to buy or not buy products. Rapaille studies the way people relate to concepts and then attaches a code or name to it. For example, one of his clients asked him to research the code for coffee. He learned through various studies that it had very little to do with taste, but everything to do with the association of the aroma. He then concluded that the code for coffee was 'smell.' The reptilian part of the brain makes people buy coffee because the smell makes people feel safe. It is no accident that some of the containers that we see coffee sold in have a graphic of what we might view as a smell or aroma.

In thinking about the code for settlement of a litigated case, many different ideas come to mind, including 'winning,' 'paying,' 'losing,' 'agreement' and so on. Yet, my guess is that if Rapaille conducted a study that looked for the most common association with settlement, he might conclude that the word 'closure' is the actual code. From a mediation perspective, focusing on closure can take on many different forms in which money is one of several key options to consider. From a claims adjuster standpoint, closure might be less about the amount of money paid and more about how it might be presented and approved by management. Therefore the conventional negotiation involving trading numbers might morph into a bigger conversation about what a negotiator might 'recommend' to management in order to get closure on the file.

Now compare the goal of closure that is in the reptilian part of the mind of the defendant to the culture of the litigators involved. Some trial lawyers view their role as folks who need to 'fight the good fight;' 'battle it out;' 'stage a war,' 'take them down.' While this approach might be useful in the small percentage of the cases that actually go to trial, it clearly doesn't synchronize with the closure code that embodies the vast majority of cases that get settled. For this reason, understanding the code that motivates the decision makers on the other side is a basic step to obtaining a just and fair settlement.



This entry was posted on Monday, January 16th, 2012 at 4:23 pm and is filed under Growth of the Field (Challenges, New Sectors, etc.), Mediation Practice
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.