Kluwer Mediation Blog

The Preventable Death of Mediation

Jeffrey Krivis (First Mediation Corporation) · Sunday, December 16th, 2012

My basic nature is to be optimistic about the future. If I were one of the six thinking hats described by author Edward DeBono, I would be the yellow hat. The yellow hat is for optimism and the logical, positive view of things. The yellow hat looks for how something can be done and requires a deliberate effort. This is the hat that got me started on my road into the field of mediation in 1989.

Several years after I began my journey, the court system endorsed mediation as a preferred method for resolving disputes. In looking back at the institutionalization of mediation in our court system, I find that there are four cycles that have gone into the movement:

(1) **Infancy** – This is when most lawyers could not tell the difference between mediation and meditation, and thought that mediators sat on beanbag chairs drinking herbal tea while lighting incense.

(2) **Childhood** – Having now defined the basic term of mediation as a process where a third party helps facilitate a negotiation, our childhood was marked by a significant event. In the case of the court system, that significant event occurred in 1993 when the California Legislature enacted CCP Section 1774 and began ordering cases to mediation.

(3) **Adolescence** – In the 1960s, the 'in thing' was to listen to the Beatles, protest against the war in Vietnam and experiment with drugs. In the 1990s, the 'in thing' was to attend mediation workshops and learn how to outfox the mediator, or how to actually transition your litigation practice into becoming a mediator.

(4) **Adulthood** – The conventional wisdom is to reject those things you accepted as an adolescent. In recent years, some people would rather have a root canal then attend another mediation and listen to an impartial neutral describe the process that ends up becoming quite predictable. Though there has been a dramatic increase in the number of cases going to mediation, there has been a decline in the appreciation of the process because of numerous factors, not the least of which is the lazy mediator. For mediation to continue in its adulthood and grow, there needs to be a reacceptance of the process.

What has happened in the last several years is that mediation has learned to need litigation to maintain its hunger for business. In the early cycle of the mediation movement, the opposite was true. Litigation needed the process of mediation to decongest the court system, presumptively save money for clients and allow more control of the outcome to the parties. Mediation has now become

a commodity for litigation rather than a useful resource. Due to the proliferation of mediators and the reliance on litigation to feed this animal, mediators are forced to conform their practices in a way that limits development of strategic techniques and creativity. This conformity means that the mediation 'product' has become a low margin commodity in many circles. Mediators copy each other in style and lose their ability to differentiate themselves. Even the high-priced mediators begin to look like their litigation counterparts, basically offering the same service.

Because of the commoditization of mediation, large consumers of our service, particularly insurance companies, are more in tune with reducing vendor costs. Since mediators have now fallen into the trap of becoming a vendor, insurers are managing the costs of the process such that they are controlling the marketplace.

As compensation for mediators has dropped, the cost of being in business has increased. The reason for this is because large insurance companies continue to cut costs, yet require mediators to provide more value, such as large conference facilities, espresso, Krispy Kreme Donuts, and lunch menus. In fact, many corporations require mediation providers to supply computerized data of statistical case information that they can combine with their usual claims analysis. As a result, individual mediators who may have started the movement years ago are now moving in droves to serve as panel members with the various providers. This has resulted in the further commoditization of the mediator, in that it is very difficult to differentiate between panel members.

The most innovative mediators have transformed their practices into unique processes in which they are able to charge for their experience and wisdom, not for their commodity.

The bad news is that the mediation profession has become predictable. Some in the legal profession think they know more about the mediation process than the mediators do. The process has often become stale and the mediator expendable.

Moreover, lawyers who bring cases to mediators often resent them because they perceive that the mediation world is easier than having clients and advocating a position. In fact, the legal world is wondering why mediators don't have some professional requirements, such as continuing education, grievance procedures, or other annual requirements to maintain their license.

In order to compete in the adult world of professional mediation, mediators must go back to their roots of collaboration. Though we are all territorial creatures, our clients are not loyal forever. We must outpace the learning curve of the markets we service. We can do this in various ways, including:

(a) Setting up online chat rooms and blogs to share techniques;
(b) Don't take our cases for granted.

We can also elevate the requirements of continuing education in order to accentuate our commitment to the process. This would overcome the anxiety of the unknown; true empowerment is giving people the process they need.

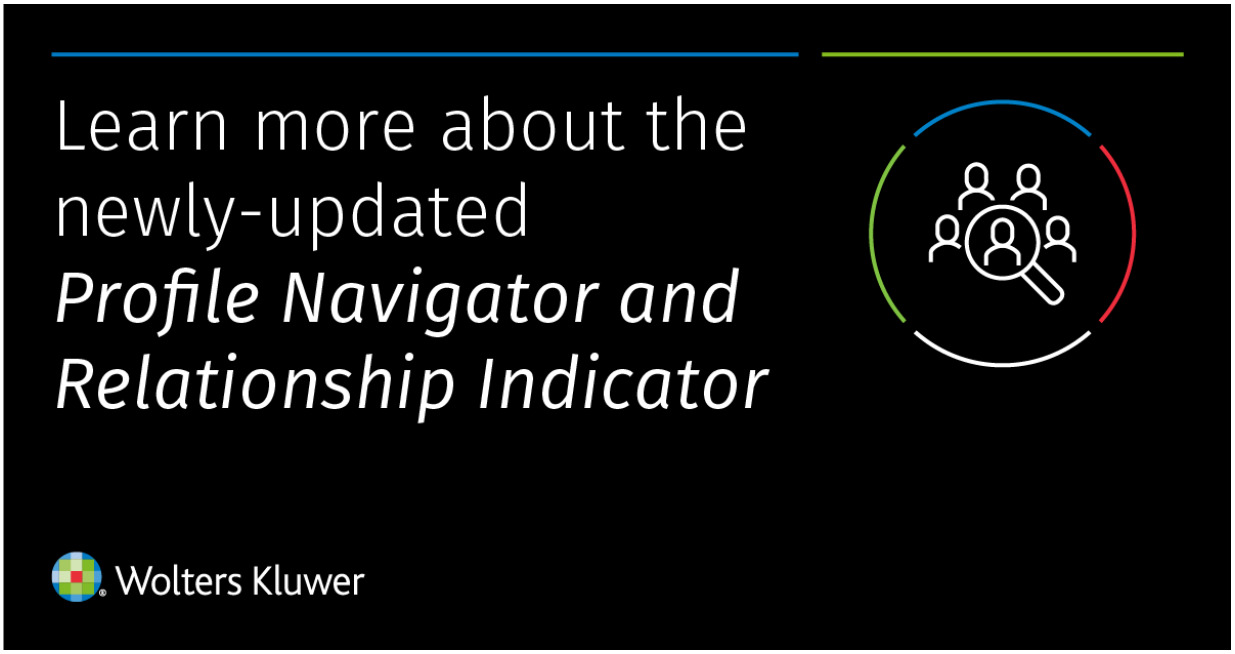
Our process is multidisciplinary and indefinable. Our clients are loyal and fickle at the same time. Like the expert trial lawyer who gets better at cross examining witnesses with experience and education, the expert mediator can begin to collaborate with his/her colleagues to learn new techniques that serve the profession.

While the responsibility for change rests significantly on the mediation community, the litigation community would be well served by learning from past experience as well. Consider the course of court ordered arbitration since it was conceived in the early 1970s. Initially it was a success for both the courts and the litigants. Cases would resolve following and arbitration because lawyers took it seriously. Cases were prepared and presented in a formal manner such that they could be thoroughly evaluated before trial.

As time passed, some lawyers began attending arbitrations without preparing, taking the easy road of asking for a trial de novo rather than spend the time getting the case prepared. Statistics on the successful resolution of cases following court ordered arbitration went into the toilet. In fact, the courts were so fed up with the outcomes of court ordered arbitrations that they have for the most part stopped referring cases into that system. Instead, the courts have preferred to refer the cases to mediation, where the parties could actually have a binding outcome following a successful mediation.

What I'm hearing from many of my students who volunteer as court ordered mediators is that lawyers are simply not preparing or taking the process seriously anymore. Defendants come into the mediation without a clear intent to negotiate in good faith and the cases lock up quickly and are put back into the court system. It would seem that history is repeating itself. Like the arbitration system before it, the mediation system that has emerged through court ordered programs has begun to slip into the same indifference that has engulfed the arbitration system.

Where do we go from here? Both sides need to take responsibility for our state of affairs. Mediators could do a better job being creative and learning techniques that are less predictable. Litigators could invest in preparation and take the process seriously. Or better yet, we could eliminate the court ordered system altogether and let the marketplace decide which cases should go to mediation.



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