

A Conversation on the Challenges of Mediation Practice

By Kimberlee Kovach with Jeffrey Krivis, Judith Meyer, and Larry Watson



Jeffrey Krivis

practices complex commercial mediation with an emphasis on class action and labor and employment disputes. He has taught at Pepperdine Law School and the Straus Institute for Dispute Resolution and is Past President of the International Academy of Mediators.



Judith Meyer

has served as a mediator and arbitrator for more than 25 years. She mediates and arbitrates commercial, employment, construction, wrongful death and personal injury, professional liability, business, intellectual property, and insurance disputes. Meyer is the principal in Commercial Dispute Solutions.



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is a founding principal of Upchurch, Watson White & Max who specializes in the mediation of complex, multi-party commercial litigation. He is a past President of the American College of Civil Trial Mediators and recent recipient of the Florida Supreme Court's Sharon Press Excellence in ADR Award.



Kimberlee Kovach, a past Chair of the Dispute Resolution Section, has worked in mediation as a teacher, trainer, scholar, and practitioner for more than 35 years. To learn more about the challenges of mediation practice and how the practice has evolved, she recently sat down with Jeffrey Krivis, Judith Meyer, and Larry Watson to get their perspectives.

Kimberlee Kovach: In the last 20 or so years, we have seen many changes and modifications to the practice of mediation. These include, for example, trends such as mediators using highly evaluative approaches, joint sessions falling out of favor, clients becoming harder to find, and increasing use of Med-Arb. Many have noted that this has been, in large part, the result of market demands. My question for you is: To what extent should — or does — the market (which I define as essentially attorney representatives) control the practice of mediation?

Jeff Krivis: To answer the question, I think it is helpful to define the "market" where these changes

and modifications have occurred and how attorneys play a critical role in its definition. The market that drives my practice is the civil litigated case. It is highly competitive, based on the concept of give and take. That concept means that limited financial resources are negotiated and traded back and forth until a deal is done. Non-monetary resources are also traded, but that is the exception rather than the rule. This market succeeds about 97 percent of the time unless a case is resolved through an adjudicatory procedure like trial. Litigators, as gatekeepers to the adversarial system, set this market in motion. These litigators have legitimate economic interests, both personally and on behalf of their clients. Mediation within this marketplace often results in a zero-sum exchange where each participant's gain or loss is balanced by a gain or loss to the other side. It's that simple.

Larry Watson: In the context of civil trial mediations, litigation lawyers are principal players and clearly influence the way mediations are conducted. Importantly, trial lawyers also play a principal role in the selection and compensation of mediators; mediation practitioners cannot ignore their process preferences. I am hesitant, however, to accept the notion that the market shaping mediation services should be solely defined by attorney participants. Attorneys often have an agenda of their own which is driven by their own goals and needs — often in directions that may not focus on benefits to the overall process or other participants. Mediation is predicated upon self-determination by the actual parties to the dispute, which includes selection of mediation processes or practice techniques. Ideally, the parties themselves should heavily influence the “market” that shapes mediation services.

Judith Meyer: Lawyer input, consultation and collaboration, is a wise thing. The mediator needs to know an advocate's preferences and state of mind. So the answer is that in some places, the market runs the practice of mediation. But for the skilled mediator who not only wants to help parties settle cases but who values her professional skills and wishes to educate advocates and their parties in best practices of negotiation and dispute resolution, the market cannot dictate practice. That mediator not only helps parties to resolve disputes; she models forms of communication that she hopes the parties will adopt in

future problem-solving. That is not to say that counsel should not consult with the mediator to choose a model of negotiation and problem-solving that may or may not be iteratively facilitative, evaluative, or transformative or a form of mediation that toggles between joint and private caucuses. The mediator is a negotiation coach. But like any coach, she encourages the players in strategies most likely to succeed. She, unlike the crowd, does not root for injuries.

Kimberlee Kovach: OK. How do we ideally provide a process that achieves “success?” Should there be some parameters of the process, what we might consider “ground rules” for mediation?

Larry Watson: Trial lawyers and the courts properly define and control the litigation process, which have very clearly defined rules. In mediation, however, there is a broader base of players, including the mediators and the parties themselves, who have a stake in defining the process. Some ground rules that will help assure an effective mediation include show up with authority; participate in good faith; respect fundamental self-determination; and let the process unfold as it was intended to occur — a confidential, informed exploration and development of dispute resolution options.

Judith Meyer: In the most mediation-developed regions — California comes to mind — the market appears to control mediation practices. In less developed regions — Pennsylvania comes to mind — not so much. At that market-driven extreme, mediation imitates the old-fashioned judge settlement conference before trial — “Okay, counsel, what are your numbers, and can you settle this thing?” — and falls into laughable disrepute. It makes hacks of mediators. Why should parties pay to get beat up? Courts do it for free. There are absolute “ground rules” in mediation. These should include the existence of a respectful dialogue with parties hearing (not just listening) to each other; advocates opining on the shadow the law casts on the dispute; the testing of risk tolerances; and the brainstorming of impossible and possible solutions. Commitment to preparation, civility, and perseverance is required.

Jeff Krivis: In a more theoretical sense, the early marketplace was built on an underlying system in which inherently competitive trading didn't always

blend with the cooperative approaches preferred by the early adopters. The economic drive that directs a litigator to get the best possible deal for their client hit head-on with the mediation movement that was concerned with harmony, cooperation, and of course, confidentiality. The real question was whether lawyers and mediators could adapt the valuable parts of the mediation process to fit the needs of the litigated dispute at the bargaining table while balancing the importance of case closure. Digging even deeper, I would say that mediation practice is designed to be more like an inquisitive system where the third-party referee is involved in investigating information from the case in order to come to a fair outcome. And the referee mediator must then assure some level of fair play.

Kimberlee Kovach: Going back for a minute to the process changes I initially mentioned, I think, Larry, you have observed that with regard to Med-Arb it is the clients rather than the lawyers who seem to request this process. Could you elaborate?

Larry Watson: Well, I don't think the advent of "Med-Arb" (essentially, "let the mediator decide if we cannot") is entirely attorney-driven. I agree some current trends in mediation practice — to seek evaluative mediator approaches, to eliminate opening sessions, to minimize client participation, and to dance around authority requirements — are largely attorney-driven. Further, I think they may well be driven by items on the trial lawyer's agenda that may not always be in the best interests of the client or the process. In my experience, however, Med-Arb has been driven by the clients. Both institutional litigation clients and one-time users are attracted to the aspect of getting closure as quickly and as inexpensively as possible. I find the clients saying, "If we can't agree, then let's let the mediator end this thing" more than the attorneys.

Kimberlee Kovach: Jeff and Judy, your thoughts and observations on the use of Med-Arb?

Jeff Krivis: This is a solution looking for a problem. In my experience, the use of Med-Arb is very limited. While it is a tool in the arsenal, its value lies less in its use and more in the dialogue between the parties about trying it if settlement isn't possible. The mere discussion of such an alternative focuses the parties

on rethinking their goals and leads to further settlement dialogue.

Judith Meyer: Med-Arb brings closure, and I agree with Larry that it is desired by both counsel and clients. In a mediation the mediator knows enough about the risks the parties face and the "shadow of the law" to render a fair arbitral decision. I mediated a rape case — the rape of an 11-year-old girl by her swim coach where the girl blamed herself — which would have further devastated the girl had the case gone to trial. It had to settle either in mediation or by letting the mediator decide.

Kimberlee Kovach: Larry, any final thoughts on the topic of Med-Arb?

Larry Watson: As a general proposition, a properly timed discussion of any alternate to reaching a settlement agreement (Med-Arb; special master; high-low agreements, et cetera) will often lead the parties back to the merits of a settlement agreement. I suspect the actual use of Med-Arb is a regional thing — it is growing here in Florida. We've adopted ethical standards to deal with mediators who become adjudicators.

Kimberlee Kovach: Even with those changes or modifications to the process, we continue to hear a great deal about all of the benefits of mediation, such as privacy and saving time and money as well as maintaining relationships. I think implicit in such statements is an assumption of settlement or resolution of the case. Yet I believe that mediation is beneficial even in those cases that don't completely settle or resolve. What do you consider a "successful" mediation?

Jeff Krivis: My definition of success has shifted over the years. Clearly making the deal is the gold card in our business, but not necessarily what the clients are evaluating you on. In cases involving multiple parties and moving parts, it is critical that they all feel like the mediator has paid attention to them and concurrently moved the ball forward toward settlement. That doesn't mean settle at all costs. Recognizing the internal constraints, particularly with institutional clients, can lead to a successful mediation even if the case is not settled at the mediation. This is where serving as a consultant more than a mediator adds value and earns the mediator stripes with the audience. Dealing in commercial trade requires an

understanding of the economic components that go into decision-making. By forcing the issue, it is possible to push a client in the wrong direction. That client may want to settle but has a constituent at the office that needs to weigh in. My goal is to provide leadership skills for all sides so that the case is navigated into a direction where everyone is paddling the same way.

Judith Meyer: A mediation is successful when parties have listened to each other and can understand and not just seek to stifle each other's point of view; when parties understand what is really driving the opposition and what really is at stake; when parties understand why they are really at the table; when issues in the dispute have narrowed and only what truly cannot be resolved other than by an interpretation of law remains; when the parties have learned how to listen to and hear each other so as to solve not just the present problem but future ones that will arise; when the level of anger and hostility in the room abates; when parties enter as combatants and leave as colleagues; when parties save themselves years of angst and frustration and significant financial cost; when what the parties identify as an insoluble problem is then solved; and, of course when the case settles.

Larry Watson: The definition of success in mediation is not necessarily reaching a settlement agreement. In a civil trial context, a successful mediation is one that provides the parties a basis for making an informed and fact-driven choice between the two options available for resolving the matter — adjudicate or reconcile; litigate or settle. As to the adjudication option, the parties should recognize the critical issues in their dispute and the positional debate that will be staged before the adjudicative body to resolve those issues. They should be aware of what each side will be arguing and what data will be presented to support those arguments. They should understand how long the adjudication process will take, how much it will cost, the potential unintended consequences, and the range of possible outcomes. As to the reconciliation option, the parties should understand the interests and concerns that need be accommodated, the best deal that can be reached, and the collateral benefits of reconciliation. Once that data has been developed and understood,

the mediation is "successful." The parties are armed to make an informed decision. What they decide is up to them. More often than not, however, good information on both options tends to support the settlement option.

Kimberlee Kovach: In discussing success, each of you has mentioned the importance of the parties, the decision makers. Yet in most of your cases, you also have lawyer representatives who often focus on the legal aspects of the matter. How do you balance — if you do — the people issues and the merits or legal issues?

Judith Meyer: A mediator toggles constantly between the people issues and the legal merits of a dispute. In mediation, you cannot separate people from the problem. The efficiency and the antiseptic quality of a trial does just that. Only the merits are considered, frequently resulting in blunt judgments that do not serve the parties' interests. In mediation, with every consideration of a legal claim, a different emotional response may attach. A claim for misrepresentation of product development in the sale of a company attacks the integrity of the company representative who negotiated the sale. He may have been relying on data he believed and is not guilty of the fraudulent intent ascribed to him by the plaintiff. If his perspective can be heard, the plaintiff can move beyond anger into problem-solving mode. And the lawyer advocates do not just spout the law. They have relationships to their clients and to the lawyers on the other side. And not infrequently, these relationships are impediments to resolution. Lawyers, like their clients, have their own agendas and their own "horse in the race." So the mediator has to deal with the meta-reality of the advocate. It gets complicated.

Larry Watson: The path a mediator must take to guide a party toward an objective evaluation of the merit issues is through the people issues. Recognizing, accepting, and sometimes validating the personal issues involved in a dispute is often the best way to divert their dominance over the issues on the merits of each parties' position in the dispute. Until the agenda of personal issues has been addressed, until the venting has occurred, it is extremely difficult to focus on the merits of the dispute.

Jeff Krivis: In my experience, in the final analysis, people issues trump merits issues. Here are a few examples that come to mind:

- a) If you, as mediator, fail to build rapport and trust with a party, they are unlikely to share with you their settlement authority, even if they are concerned with the merits of the case;
- b) Mediators who insult the intelligence or view of the participants will often shut down a merits-based discussion;
- c) If you, as a mediator, connect with the parties on a personal level, they will be more receptive to a principled discussion of the merits.
- d) A high-profile plaintiff's attorney who has obtained large verdicts and is not afraid to try just about any case is a wild card in mediations. If the plaintiff has a weak case, the merits can be put into a "market value" category, but the lawyer can do damage.

Kimberlee Kovach: Mediation is an often-complex process indeed, and I know and appreciate the many years of success each of you has had as a mediator. Through that experience, is there any particular innovative or unusual technique that you have found especially effective in what may otherwise be an impasse situation, one that you are willing to share publicly?

Jeff Krivis: Literally books have been written about this question. Here's my philosophy: I view every case as a drama in which my office is the theater and the parties are the actors. There is no script to keep the narrative going, so we have to make things up as we go along. This is very much like improvisational theater, where the goal is to keep the dialogue moving forward by: 1) making the people on the stage look good; 2) using "yes, and...." techniques; 3) understanding and respecting the "status" (pecking order) and "shifting status" of all participants; 4) remembering that there is a beginning, middle, and end to every drama, and it is your job to make sure the parties experience those moments. With that framework, it is fairly natural to find techniques that address moments where things lock up. Static formulas generally don't work unless it is a commodity-type case where there are repetitive fact scenarios and predictable outcomes. The improvisational mindset creates dynamic moves that work with the

impasse to fit it into the entire case narrative without putting up walls.

Judith Meyer: The only truly unusual technique I have used: threatening to walk out. I threaten to stop working with the parties and leave them to their own devices and pursuit of the litigation path, i.e., telling the parties that they love their dispute enough that they should just embrace it and continue. This has had the effect of creating a huge pause and some reflection, and in the only cases where I have tried it, a request that I continue to mediate.

Larry Watson: Downstream mediation program, a well-known and commonly used technique, that is still remarkably successful. When an impasse looms, I try to focus the parties on the primary point or points in dispute that appear to be blocking further progress toward an agreement. Once that central issue has been identified, I shift the focus of discussion to identifying what could be done to shed more light on the source of the potential impasse. What additional information would help change the parties' landscape and serve as an appropriate basis for a re-evaluation of their respective positions? What is the quickest, easiest, and most cost-effective way to get that information? Under the umbrella of a confidential and privileged continued mediation process, we then devise a downstream program to develop that data and adjourn to complete that task. Once the information is developed, we reconvene and continue discussions. In short, don't stop talking. Just shift the conversation to something else.

Kimberlee Kovach: In reflecting on your career, what is currently (or what do you perceive in the near future to be) the biggest challenge in your practice?

Jeff Krivis: Staying fresh. Finding opportunities to use the skills I have learned in a philanthropic way. Showing appreciation to the many people who have had confidence in me without taking them for granted.

Larry Watson: Dealing with the growing body of "institutional consumers" of mediation services, i.e., insurance carriers, corporate risk managers, claims adjusters, et cetera, and their effect on mediation presents a significant challenge to any civil trial mediator. The drive to achieve claims management cost savings by this segment of the dispute resolution community filters into mediation programs in a

number of ways — not many of them good. For one thing, the business is becoming depersonalized. The constantly shifting population of claims managers, adjusters, defense counsel, and corporate risk management personnel brought on by competitive pricing makes building personal relationships difficult, if not impossible. Pressures are being exerted to shorten mediation sessions and eliminate critical components of the process. Lawyers who are pushed to hold down costs are appearing at mediations ill-prepared to participate in a productive manner. Perhaps most egregiously, the representatives of institutional consumers are appearing at mediations with little to no authority to reach reconciliation. In far too many instances, the mediation process is being used to discover information about the claim, to forestall final reckoning, and to gain litigation advantage. The institutional consumers have legitimate interests in cost-effectively and efficiently reaching the critical decision point for resolving civil trial claims. We must, however, develop ways of accommodating those interests without sacrificing the core values of the mediation process.

Judith Meyer: Some of the biggest challenges for me in the future are the same as the biggest challenges in the past:

- convincing litigating parties and their lawyers to take charge and control of the dispute at hand rather than letting a pretrial court order determine the pace, fate, and outcome of the dispute;
- challenging parties and lawyers to prepare for and respect the process; and,
- making mediation a credentialed profession rather than a cottage industry.

A challenge I think about now with greater frequency and urgency: how to conclude a career having made a difference.

Kimberlee Kovach: I certainly am confident that all three of you have made a wonderful difference in the practice of mediation, and I thank you for sharing your collective insight and experience. ■

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