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 SECK LAW



The art of ADR

WHAT HAPPENS WHEN MEDIATION, IMPROVISATION, AND TRIAL ADVOCACY CONVERGE?

“A mediator, a lawyer, and a stand-up comedian walk into a conference room...”

When I first began practicing law, I expected my initial encounter with a mediator would occur during an actual mediation. Instead, it happened in an improv class for lawyers, taught by the legendary mediator Jeffery Krivis and esteemed trial attorney Brian Breiter. At that time, Breiter was known for his unconventional approach. A lawyer and comedian, he pushed the boundaries of courtroom decorum. Krivis, a pioneer among Southern California’s first lawyer-mediators, was renowned as one of the most respected and sought-after neutrals in the plaintiffs’ bar.

In my first year of practice, I discovered that Breiter and Krivis were teaching Improvisational Techniques to lawyers. The course, held over several weeks, was designed to enhance trial skills. Our sessions took place in a mid-Wilshire conference room rather than a traditional classroom or courtroom.

Walking into the windowless room, I was unsure what to expect. The conference room had been rearranged: The table was pushed aside, and chairs were lined up against the walls. A dozen or so lawyers were scattered about, discussing their cases. As the most junior lawyer there, I only recognized a few participants, which felt unsettling. I wondered how an improv class could benefit courtroom practice and what relevance it had to mediation.

Soon, we formed a circle for a warm-up exercise. We were asked to assume a character with traits vastly different from our own. We then took turns interacting with other participants (also in character) as though we had known each other for years. We “performed” spontaneously, and I felt uncomfortable and self-conscious at first. However, these feelings faded as the course progressed. I felt supported by the group; there were no wrong answers or actions due to the absence of a script. Boldness and risk-taking were encouraged and celebrated.

Trial and theatre

There is a compelling connection between the improvisational skills taught by Breiter and the essential abilities of trial lawyers. Breiter’s improvisation techniques

are not just about drawing the jury in and holding their attention; they are foundational skills that directly enhance trial advocacy.

In improvisation, Breiter emphasizes being present, thinking on one’s feet, and adapting to the moment – skills that are crucial in the courtroom. Trial lawyers must be agile, reacting quickly to unexpected developments, whether it’s a surprise witness, a sudden change in strategy, or an unforeseen reaction from the jury. Just as improvisational actors must stay attuned to the dynamics of their performance and adjust their responses spontaneously, trial lawyers must be equally responsive to the shifting elements of a trial.

Breiter’s focus on stepping out of one’s comfort zone and embracing bold, creative thinking is particularly relevant for trial lawyers. In the courtroom, presenting a compelling case often involves storytelling and setting scenes, much like a performance. Lawyers need to craft narratives that captivate the jury, provide vivid details, and pivot when new information emerges. The same principles of spontaneity and adaptability taught in improvisation apply to how trial lawyers build their arguments and respond to the unpredictable nature of trials. Breiter’s approach encourages taking risks and embracing the unknown. The ability to remain dynamic and unafraid in the face of challenges, as nurtured through improvisation, is vital for successfully handling the unexpected twists of a trial.

By integrating improvisational techniques into their practice, trial lawyers enhance their ability to remain flexible, engage effectively with the jury, and adapt their strategies as needed – skills that are as integral to courtroom success as they are to a well-executed improv performance.

Mediation and improvisation

During that first improv course, I initially wondered what Krivis, as a mediator, gained from teaching lawyers improvisational techniques. I questioned whether empowering lawyers to be more effective trial advocates – potentially steering them away from settlement – might be counterproductive for him. However, as I gained more experience and observed

Krivis in action, it became clear that the skills he teaches in improvisation are directly applicable to his role as a mediator.

In improvisation, Krivis emphasizes being fully present, adapting spontaneously, and responding to the dynamics of the moment – skills that are equally crucial in mediation. As a mediator, Krivis listens intently, reads between the lines, and engages deeply with the parties involved. These are the same skills he cultivates through improv exercises, where participants learn to be flexible and perceptive in real-time interactions.

Improvisation trains lawyers to react swiftly and creatively to unexpected developments, a key aspect of successful mediation. Krivis uses these techniques to navigate the fluid nature of mediation sessions, adapting his approach based on the evolving needs of the parties and the nuances of their communication. Just as improvisational practice encourages participants to embrace uncertainty and think on their feet, Krivis applies this mindset to mediate effectively, helping parties find common ground and resolve disputes even when the process deviates from the planned course.

Choosing the right mediator for you and your case

As a trial lawyer, the thought of settling a case that could be tried is unsettling. Many cases, after years of litigation, are ripe for resolution. By then, attorneys are emotionally and financially invested, and clients are weary. However, not every case should be tried. In such instances, choosing the right mediator is crucial.

When selecting a mediator, factors like popularity, reputation, experience, and affiliation are important, but trust is paramount. I consider whether the mediator will keep an open mind, be honest, respect my position, and provide clarity. They should inspire confidence, maintain confidentiality, and effectively read the room. Additionally, I now include the ability to improvise – whether they can pivot and keep the mediation on track when things don’t go as planned.

Fortunately, CAALA members have access to many skilled mediators. When excellent lawyers and mediators come together, the client wins.