KISS Mediators Rock ABA Conference

Why Would Three Self-Respecting Professional Mediators Play Dress-Up?

Many attendees at this year's annual conference of the Section on Dispute Resolution had to look twice when they saw one of the characters pictured here walking the conference halls. When most learned that these were actually colleagues, the question was the same: Why would these self-respecting mediation professionals play dress up at a serious conference?

The educational session was titled, "Heavy Metal Mediation"

It was about a taking a Rock-N-Roll attitude toward mediating commercial cases. But why the make-up?

The message was the medium.

The rest of the course's title was, "Real Tools for the Real World of Commercial Mediation." The message was about more than getting "outside of the box" – it was about trampling all over the box and tearing the box to shreds. It was three hours of "forget everything you learned in Mediation 101" and "if it isn't broken, break it!" and "rules are made to be broken". Convention had no place in this two-part skills session, and that message needed to be driven home emphatically. There needed to be no doubt about the unbridled permission that the attendees were given to break most every rule ever taught in most conventional mediation trainings. The best way to deliver such a message? BE the message. LOOK the message. DRIVE the message home with an unforgettable visual. To be effective, and to accurately convey the rebellious content of the message, this program needed to look, sound and feel different than any other CLE program ever had.

The message was very serious.

The message was an important one: Mediation, as it is taught in most settings, does not resemble what the civil litigation community seeks when hiring a mediator. Hard core litigators do not hire mediators because they have reputations for being sensitive, empathetic, active listeners who facilitate communication without affecting outcome. Mediators peddling these skills and processes to the litigation community and are fast convincing themselves that there is no career path in mediation, but the data doesn't support the conclusion. Mediators who want to be facilitators and transformers have two choices, and selling those skills to the litigation community is not one of them.

Facilitative mediators can find other outlets to practice their skills, such as workplace conflict in enlightened organizations and family law, or they can get serious about figuring out what the civil litigation marketplace values.

If this sounds like a harsh approach, the people behind the make-up want mediators to know that it is. On purpose. The mediation community in 2006 must either meet the needs of the litigation community as they stand today, or be prepared for a massive exodus from the profession in the coming years.

For now, those wanting to practice facilitative mediation, help parties feel listened to, connect with the better part of the participants and appeal to the better part of the humanity in those with whom they are attempting to resolve conflict, need to learn some of the skills from the dark side, hereinafter known as Heavy Metal Mediation.

How to practice Heavy Metal Mediation.

This session unabashedly discussed the realities of mediation including such taboo subjects as manipulation, intimidation, mediator tactics, mediator ego, lack of real confidentiality, and how to void a mediator liability policy (with a special guest appearance (sans make-up) by Betsy Thomas from the band at Complete Equity Markets).

One example of the taboo issues this group raised was the question about why mediators try to ascertain the parties' underlying interests if not simply to use them to manipulate the parties later in the negotiation? When a party tells the mediator that they really cannot fund a full-blown, scorched-earth litigation campaign, while this might be confidential from the other side, doesn't the mediator simply use that information late in the day when that party is holding out, resisting movement toward settlement? Successful commercial mediators from the Dark Side will say (at 5:30pm), "Look, you told me this morning that you can't afford the litigation you're threatening, so it's time to get real about settlement."

While many self-respecting mediators may have just gasped, and perhaps rightly so, the ugly truth is that the litigator sitting next to that party wants the commercial mediator to say that to their client – in part because they cannot.

The presenters told the attendees that those who are faint of heart should not pursue commercial mediation. One said that commercial mediation is for carnivores, not vegetarians. Commercial litigators demand that the mediator take control and play an active role in the mediation. Surveys and lawyer feedback has consistently shown that in most litigated cases, the attorney-advocates want the mediator to rull up their sleeves, take the gloves off, and say it like it really is. Some make fun of what they call "potted plant" mediators.

Brash statements? Yes! Necessary to hear? Absolutely. But in today's world, this is the reality of the commercial marketplace, and the first step in successful business development requires defining one's marketplace.

Kendall Reed, a Los Angeles mediator explained, "In KISS, Berman, Obradovic, and Kichaven have identified a brilliant metaphor for today's successful mediator: virtuoso technical skills combined with outrageous, in-your-face energy!"

Those in attendance took copious notes as the presenters talked about what *not* to do, and described how each of them work hard to get outside of the box to create, invent and manufacture settlements when none appears possible. This is what the real world of commercial mediation demands. Litigators want die-hard closers. They are paying mediators thousands of dollars a day, and they expect results.

The presenters went out on a limb.

Lee Jay Berman and Jeff Kichaven from Los Angeles and Michelle Obradovic from Birmingham, Alabama knew that the message was so important that they were willing to risk sacrificing hard-earned professional capital to drive this point home. Outfitted in full face make-up and authentic KISS wigs and T-shirts and costumes, they ventured out among the retired judges, seasoned litigators, academic educators and successful practitioners who are their colleagues and put their reputations on the line in order to create a visual anchor for the benefit of those who attended the session.

All three are Fellows with the International Academy of Mediators. Berman and Kichaven are affiliated with Pepperdine's Straus Institute, and Obradovic with Cumberland Law School in Birmingham. These are serious mediators, all three of whom are rarely seen out of a business suit.

Samuel "Chic" Born with the Ice Miller firm in Indianapolis said, "Really good mediators are really quite unique. These three showed us that, and showed us that really good mediators are, likely, also risk takers. The fact that they 'played' characters from a KISS concert not only implicitly – but explicitly – demonstrated that the work we do must continually involve … being creative. That is, in my judgment, the mark of an effective mediator."

In addition to the costumes, the Heavy Metal Mediators continued to deliver the wake-up call by occasionally going so far as climbing onto the tables to make their point. Attendees said it was a great reality check for them.

Jack Sylvester, a mediator from Maine said, "Platinum all the way to "Heavy Metal Mediation: Real Tools for the Real World"! The presentation format was great fun and kept focus riveted for the entire session, but the fast-paced, thoughtful discussion of mediation tools used by three highly-skilled mediators really stole the show."

Some Concepts of Heavy Metal Mediation

Evaluative mediation is here to stay. Kichaven said that mediation often works best when lawyers want the mediators to help "break bad news" to their own clients about the downsides and weaknesses and risks of their own side of the case. Mediators uncomfortable with this kind of evaluation are unable to help the attorney. Kichaven emphasized that mediation rarely works when lawyers want the mediator to "make them understand just how weak their case is" where “them” means the other side.

Berman said that “cost of litigation” analyses are dead and should be buried. While a very real economic component of any case, sophisticated litigants do not need mediators to hit them over the head with it. He said that a cost of litigation argument is a mediator’s weakest tool and, if used at all, should be used in a way that suggests that the parties must have already considered this, but that it might bear mentioning.

Kichaven said that it is foolhardy not to consider the lawyers to be the mediator's "clients". He also cautioned that it is foolish to disagree with a lawyer regarding their evaluation of a case, emphasizing that they know and have analyzed their own case better than we know or have analyzed their case (or at least they THINK they have!). Berman says that the mediator knows the least about the case of anyone in the room – both at the start of the mediation, and at the conclusion. Some mediators might disagree with these statements, but sometimes, mediator ego makes them forget that mediators are only told what the parties want them to know, and that the idea of mediation advocacy to some is to “spin” the mediator. Kichaven reiterated that mediators will almost never persuade a client to believe anything different than their own lawyer has told them about the strengths and weaknesses of their case.

Obradovic talked about convening, saying that she uses confirmation letters and checklists mostly to ensure that counsel prepare for the mediation and to spur them into having preparatory conversations with their clients. Berman echoed that for him briefs serve the same primary purpose – to force the attorney to think about the strengths and weaknesses of their case and their settlement posture, and forward it to their clients to read.

Obradovic also touted preparation and working with counsel to set the mediation up for success. Where convening and pre-mediation are taught in most typical mediation trainings, Obradovic emphasized that most mediators miss important opportunities to discuss various process design options, such as the need for multiple sessions or whether to negotiate in phases such as classification of injuries, damages for each class and attorney's fees. Obradovic said that the mediator should continue to guide the parties in their preparations up until the mediation day. All three agreed that this is best practice, and that finding the time in a busy mediation calendar is the biggest challenge, but that litigators expect this level of service for the fee they are paying.

Berman challenged that it is the mediator’s job to ensure that the right people, with the right authority are at the mediation. He said that this is part of convening, and that the

parties count on the mediator to do this, and that to think otherwise and be "hands off" is naive.

Berman also claimed that, in truth, the mediator is the one responsible for impasse. He said that impasse was nothing more than poor planning by the mediator, and referenced his article in the materials titled, "Impasse is a Fallacy." He challenged every mediator in the room to take the responsibility for being the only professional in the room who sees both sides of the case, should understand each side's negotiation strategy, and should see early in the day if the negotiation is headed for an impasse and head it off before it happens, rather than letting it occur. He told the mediators present that it was their job to maintain a bird's eye view of the mediation and focus on the big picture, rather than allowing the parties and their counsel to steer their attention to minutia. He challenged mediators to stop having conversations and issue debates with lawyers that begin with phrases like, "Yeah, but…" and rather, take responsibility for moving the discussion toward, "What does this mean to us in the big picture of getting this case settled?"

Kichaven harmonized melodically with Betsy Thomas when addressing a mediation's grand finale. They cautioned that many mediators, in trying to be helpful and demonstrate their value, will pick up the pan or sit at the computer to play scrivener to the parties' agreement (or worse yet, draft it themselves for the parties). They recommended that these mediators might want to read their malpractice policies closer, as they may be voiding their coverage by doing so. Kichaven emphasized that a skilled mediator can continue to facilitate the drafting without a pen in his or her hand.

Kichaven and Berman also reminded mediators that many begin a mediation by promising confidentiality, but that while each state is different, what is often called confidentiality, is actually no more than inadmissibility. Citing California's strict confidentiality statutes, they pointed out that they live in the California Evidence Code and only address admissibility, and not privacy or a cloak of silence. Most mediators can offer no protection that prevents the parties from going home and telling their neighbors or a newspaper reporter, so mediators should be cautious about over-promising with regard to confidentiality.

One last point was that all three presenters often hear from colleagues that they have been doing volunteer mediations for lawyers for years and have never been hired privately to mediate a case. The message here was that the answer often lies in the mirror. In many jurisdictions, mediators criticize the marketplace or the local court program. While these may be valid complaints in some areas, in the end, if some mediators are being hired privately after working in these programs and others are not, this difference is likely a reflection of the marketplace's response to what individual mediators bring to the table that others do not.

Those who shared the Heavy Metal experience with Berman, Kichaven and Obradovic will likely never mediate the same after this experience as they did before it. The message was extremely practical, the presentation was passionate, and the costumes created an unforgettable visual pneumonic. The sentiment (with tongue-in-cheek

attribution to their friend and colleague Jeff Krivis) was that improvisational jazz may be fun to listen to and delightfully artful in its performance, but heavy metal mediation is what the market demands and what gets cases settled.

Berman introduced the session by telling the audience that the presenters were going to challenge them. It ended with him respectfully suggesting that they go home and take one of those rubber wrist bands from a fundraiser, flip it over, and with a marker, inscribe WWKD on the bracelet and wear it to their mediations as a reminder of the experience from that day and to motivate them to be unique, take risks and get out of the box of traditional mediation.

The inscription? A light-hearted, humorous acronym for "What Would KISS Do?"

For those who did not attend the session in person, the audio CD is available through the ABA Section on Dispute Resolution. Don't let the Parental Advisory Label scare you.

Lee Jay Berman *is a mediator and trainer whose practice is based in Los Angeles. He is co-chair of the ADR Practice Development, Business and Skill Development Committee of the ABA's Section on Dispute Resolution . Comments can be emailed to leejay@mediationtools.com.*