

OPEN NINTH:

CONVERSATIONS BEYOND THE COURTROOM

NEGOTIATION + MEDIATION = RESOLUTION

EPISODE 45

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HOSTED BY: CHIEF JUDGE FREDERICK J. LAUTEN

>>Welcome to another episode of “Open Ninth: Conversations Beyond the Courtroom” in the Ninth Judicial Circuit Court of Florida. Now, here’s your host, Chief Judge Frederick Lauten.

>>**CHIEF JUDGE LAUTEN:** Good afternoon. I’m here today with Lawrence Kolin, who’s a mediator and arbitrator at UpChurch, Watson, White and Max, and is a member of the Orange County Bar Association, a Florida lawyer of course, and a good friend. So Lawrence, I want to welcome you to Open Ninth.

>>**MR. KOLIN:** Thank you, Chief. I’m very impressed with the series so far and honored to be on it.

>>**CHIEF JUDGE LAUTEN:** Thanks. So you’re currently serving as a neutral or a mediator, and I wonder if you could tell our listeners, what is mediation and what do mediators do?

>>**MR. KOLIN:** Well, sure, mediation has been around for thousands of years and it’s really the way that most disputes get worked out. So a mediator is somebody who doesn’t have an interest in a conflict, and is able to listen to both sides and perhaps control, facilitate and try to get the sides to see some common ground and then resolve the dispute, but as the parties decide. Unlike what you do every day as a judge, where you or the jury are deciding what happens in a case, the parties in mediation are the ultimate determiners of the outcome. So self-determination is really the paramount.

>>**CHIEF JUDGE LAUTEN:** Great, so you went to the University of Miami Law School?

>>**MR. KOLIN:** Correct.

>>**CHIEF JUDGE LAUTEN:** And when did you graduate from there?

>>**MR. KOLIN:** '94.

>>**CHIEF JUDGE LAUTEN:** Did you then enter into a civil practice? What is your legal background?

>>**MR. KOLIN:** Yes, I did a lot of trial practice in various areas, in health care, intellectual property, commercial, real estate, so I had a pretty wide background and I enjoy the variety in practice. And I always found myself trying to work cases out even though I love trial and it's very tiring, very exciting the few times that you get to go, because the cases I thought that should try never seem to try. And the cases that shouldn't try seem to be stuck in, and I always liked seeing the mediation process from the side of an advocate. And I wondered what it would be like to be in the middle and I think in my own family, I often was in the middle trying to resolve little disputes. So it's sort of naturally who I am.

>>**CHIEF JUDGE LAUTEN:** And when did you make the transition from practicing law as an advocate to becoming a neutral or a mediator?

>>**MR. KOLIN:** Well, you used to have to be a lawyer for five years to even get certified as a mediator.

>>**CHIEF JUDGE LAUTEN:** Okay.

>>**MR. KOLIN:** And that's no longer the case. But, yeah, as soon as I was at five years, I took the course with David Strong who had been a circuit judge, very good educator and I began to do them on the side. So I would try cases and then once in a while a friend would call

and say, hey, do you want to help us get rid of this one and then it just kind of snowballed and then in 2009 I decided to really market it and in 2010, I jumped and did it full time, so since then.

>>**CHIEF JUDGE LAUTEN:** So for seven years you've been mediating disputes fulltime?

>>**MR. KOLIN:** Yes.

>>**CHIEF JUDGE LAUTEN:** Okay, so explain to our listeners a little bit to the degree you can, because I know you can't talk about any specific mediation that you've done. What happens in mediation? What's it like? Where does it occur, and how does it start? It's kind of a mystery to a lot of people.

>>**MR. KOLIN:** So I think a lot of people have, you know, this view of it that there's some secret to it or that the mediator is going to know the outcome in advance, and really we feel our way through as well. So I often don't like the parties to tell me where they want to be at the end of the day. What I want them to do is really tell me about their case, really get heard and really have tried each side to listen to the other. And that's sometimes the biggest piece of the process. Now, we have caucusing, so you start in joint session.

>>**CHIEF JUDGE LAUTEN:** All right. So you're in the room and both parties that have a dispute are there?

>>**MR. KOLIN:** Yes, usually.

>>**CHIEF JUDGE LAUTEN:** Are they there with lawyers usually, yes, no?

>>**MR. KOLIN:** I do pro se occasionally, but yes, usually represented. And these are cases that are not your small claims that you have downstairs here the courthouse which are

fairly quick and involve low dollar amounts. These are cases that would be in your business court division, or in your civil division. And we usually have a significant amount in controversy. And they've either started and the parties have decided, geez, we want to save some money, let's take the money that we're going to spend litigating and put it toward a settlement, or they've litigated for two years and the clients are ready to come in from the cold before the uncertainty of a trial. So we sit down –

>>**CHIEF JUDGE LAUTEN:** Okay. So you start with caucus. Tell us what that is again?

>>**MR. KOLIN:** Right. So the mediator will explain the process. And the process is really one that doesn't involve evidence. It's not formal like a court system; it's voluntary. So just showing up is really the only requirement. And it's confidential. So all parties must be bound by Chapter 44 of the Florida Statutes, which requires everybody to keep confidential the communications that occur inside the mediation. And that lends itself to candor and to sharing things that might be quote unquote safe for trial, and to have the ability for the parties to be casual about it and to share information that might go toward a settlement. So it's very good because we have them looking at each other eye to eye, that's not being filtered by the attorneys, by the presentations. And then we break apart in what's called caucus.

>>**CHIEF JUDGE LAUTEN:** You start together?

>>**MR. KOLIN:** Yes.

>>**CHIEF JUDGE LAUTEN:** What do you call it? Is that caucus?

>>**MR. KOLIN:** Joint session.

>>**CHIEF JUDGE LAUTEN:** Joint session. And then, do the sides give like an opening, do they do any talking or do you do all the talking?

>>**MR. KOLIN:** Sure, I usually, instead of saying, well, the plaintiff go first, I let the parties decide if they're going to put on the proverbial dog and pony show. Some do. Some keep it more casual or more pointed as to the points they want to have the other side listen to while they're together. It's not the same as an opening at trial, but certainly the parties have an opportunity to present videos. They can present deposition testimony, sometimes power point, things like that. And sometimes it's not so fancy. It's just hey, look, you know, I know we've been at this a while. These are the kind of things I wanted to stress that I've seen on our side. I want to listen to your side and everybody is there in what we call good faith. And there's no real definition for that, judge, and I hope that doesn't get litigated in front of you. But the idea is we're all here to try to solve something, not to make it worse.

>>**CHIEF JUDGE LAUTEN:** So then the parties tend to split up and, what, you go talk to one side and then talk to the other, and go back and forth and back and forth?

>>**MR. KOLIN:** Correct. Yes, we try to, you know, engage the parties. Usually, starting with the person who wants something, it's either money or it's a demand for some action and try to determine, distill down, what is that and whether it's even feasible. And then, for the party that might be defending the action, what is possible? Are there resources? Is there a non-monetary solution? Sometimes in the intellectual property field, we have license deals that occur. We have people who come out actually, not just happy that they've settled a matter, but happy that they're in a new relationship that's better than the old one. So it can be positive, yes.

>>**CHIEF JUDGE LAUTEN:** Interesting. Is there any standard time period for mediation, about how long do they take?

>>**MR. KOLIN:** Well, I found that sometimes they go way into the wee hours of the night, but no, standard times, I'd say that people schedule for a day or a half day, and I don't really – I used to try to figure out whether it settled more on Friday or Monday, and these kind of things. I don't think there's really any pattern to it. I would say that when you do start like at 1:00 o'clock or something, you sometimes get crunched so, you know, it's often pennywise and pound foolish to try to do the half day if it's got any complication to it. And I tend to like the meaty ones, the multi-party ones, but there are ones, you know, with a simple auto accident that can go a couple of hours and be done.

>>**CHIEF JUDGE LAUTEN:** Okay, gotcha. I know from having been in a civil division that about 98% of civil cases settle –

>>**MR. KOLIN:** Correct.

>>**CHIEF JUDGE LAUTEN:** -- which is a number that shocks the public, but that's true. That means we try two percent of the cases. We're trying hundreds and hundreds of cases because thousands are filed every year. Is there a statistic for about how many cases get resolved in mediation?

>>**MR. KOLIN:** I would say, we don't track because it's hard after you adjourn a case, if it hasn't settled, and I try to follow up always – I'm very persistent – to see what happened. And I think the whole process leads to that resolution of the claim. And sometimes it just takes a little more time past the mediation in order for the claim to disappear. So I will follow up with counsel, will stress that they should keep the communications open. That I'm there – the

mediators are there for them to help facilitate any ongoing discussions. It might be about money, it might be about an insurance policy, it could be about a timing of it. It could be a lot of variables that might not have been exactly ripe the day of the mediation. But I find that the process is always productive and it always yields some new information to both sides that they haven't thought about or that they might use to actually resolve the case, if – hopefully not at the courthouse steps when it's already taken up judicial resources. So, yeah, it happens.

>>**CHIEF JUDGE LAUTEN:** Do you, in your experience, do cases ever settle right there on the spot?

>>**MR. KOLIN:** Yes.

>>**CHIEF JUDGE LAUTEN:** Does that happen often?

>>**MR. KOLIN:** The majority of them are having an agreement, and of course the civil rules provide for we have to make it come about. It doesn't mean that we have to write it, it doesn't mean that we have to sign it, but we have to make sure that the parties, what they've identified as the deal, gets written up and signed. And I try to do that. Now, you know, you're not – there's no coercion and we cannot do this in the mediator rules, but I often say, you know, please sign before you leave. You're going to have a problem if you don't. And usually there's some documents that might be ancillary to a deal. There could be litigation over an agreement to agree, but the overall process is really when you want to have a mediated settlement agreement and it's been signed in writing and copies are given to everybody on the way home. There's less of the buyer's remorse. And I find if you have a deal and you're very close and that doesn't get done, sometimes someone will go to their business partner or their wife, and then the whole thing blows up and eight or ten hours of work go out the window. So it's advisable to try to get

something fashioned. It doesn't have to be fancy. And it's really a contract for how you go out of the case.

>>**CHIEF JUDGE LAUTEN:** So you said earlier that mediation has been around for a thousand years –

>>**MR. KOLIN:** Or more, three.

>>**CHIEF JUDGE LAUTEN:** Thousands of years. But I – when I started practicing law, it seemed to me that a lot less was heard about mediation than today. Today, I think there are a lot of mediators and you hear about it, and the court orders mediation. We have a small claims mediation program formally here in the courthouse.

>>**MR. KOLIN:** That's right.

>>**CHIEF JUDGE LAUTEN:** Family court mediation program that's formal here in the courthouse. So when did mediation sort of take off? Was there sort of a moment in time where it became a lot more popular than in the past?

>>**MR. KOLIN:** Sure, in the late 80's in Florida, at least, we had some forward thinking people that said, look, you know, these are cases that need to be resolved. The court system is very busy. We need to come up with some rules, some standards and have people abide by them and have these to go to court. So basically, the court started ordering them so we had the help from the judges to say, hey, try this process. If the process doesn't work, I'm always here for you and it started to work. And people at first was of course very skeptical. Hey, I can settle this with a phone call, but as you know, litigation became more contentious. The idea of having someone who's not only a neutral, but a neutral with experience in a particular type of litigation, who can talk to both attorneys and the parties, maybe get them to see a different viewpoint, to

maybe massage and see something they didn't see before, those kind of aspects, the neutral really rose to the occasion. They were sort of the unsung hero of the dockets, you know, in getting rid of them. So as it became more and more standardized and I think young lawyers in mediation courses in law school, and ADR courses, negotiation courses and things like this, it becomes very familiar to people. And it's now very commonplace and most of the country, although Florida is one of the foremost and future states, I think that we always stay on the cutting edge.

>>**CHIEF JUDGE LAUTEN:** So a lot of mediators are former practicing attorneys, it appears to me; is that a fair assessment?

>>**MR. KOLIN:** And many judges.

>>**CHIEF JUDGE LAUTEN:** And many judges, former judges, that's true.

>>**MR. KOLIN:** Who sometimes don't like to relinquish the ruling part of their job.

>>**CHIEF JUDGE LAUTEN:** Right. They don't want to become true neutrals. They are like, what I say goes, yeah, I believe that.

>>**MR. KOLIN:** Well, that's also a good characteristic for an arbitrator and that's another form of alternative dispute resolution, but sure, there's a lot of practicing attorneys who try to do it out the backdoor and I did that myself. And I found the problem was conflicts. You know, you have an industry that you represent and one day you're advocating for an insurance company and the next day you're going to be a neutral and the company is writing a check in a case where you're neutral. So there's a lot of hazards in that and so being a full time neutral really helps to break free of that, and have no conflicts.

>>**CHIEF JUDGE LAUTEN:** So as a mediator, I assume you get paid?

>>**MR. KOLIN:** You get paid. Parties usually share the bill. Sometimes they agree that one side will pay and we hope not to see you for enforcing the payment, though it's in the civil rules. It's a service I think that sometimes gets abused in terms of people set a mediation to sort of make something happen in a case but then ultimately may cancel and not go through the process. And I'm happy that they went – the case, they talked about it, they tried to resolve it and maybe it did go away, but I'm often curious as to how it would have been different had they actually gone through the process. And I think we create value, and I think we're not that expensive in terms of cases and the ultimate settlements that maybe you should try using the neutral rather than think that maybe the best deal was between you and the other sides' counsel, yeah.

>>**CHIEF JUDGE LAUTEN:** In your experience, is it best to mediate early in litigation, in the middle of litigation or at the end of --

>>**MR. KOLIN:** Okay, I would say it depends. Of course, this is the lawyerly answer. But no, I think that there are cases that are very much the smart thing to do is to get them done early, and those are ones that maybe where liability is clear but we have a damages issue or something that's going to take experts and a lot of money to litigate. And so perhaps if you can get the information, and that's really what it depends on, how much do you know at the early stage in the case. So if it's the blind leading the blind, the ultimate outcome is likely not going to be a settlement, but rather an impasse. In other words, we say a no agreement. But if you have a lot of facts and you've been dealing with a situation that's brewing in anticipation of litigation, you have enough to come in with an idea of where you want to go and not spending the money litigating, then sometimes those do get resolved early. And it's cases where, let's say there's two

businesses that need each other, a vendor, supplier, or something where you know you really are not going to have a good time if there's two years of litigation and you're shut out from something you need for your business. They're partners in a business; it's almost like a marriage sometimes, like a family case. So these things can be very quickly handled, and try to get back to the status quo or at least some better situation. And I think parties that try it early also try it late, so they might have learned something through the process, decided, okay this is what we need to go and get discovery-wise, and particularly with e-discovery and things like this. And we have a new process where we call e-neutrals, we're in this, we know we can't settle it right now but we can say, here's the universe of information that you have – let's try to tamp down on this, tamp down on the cost of this which can sometimes dwarf the amount in controversy. And put the parties on a path toward a case managed discovery approach where there might be a successful mediation at the end of it rather than a big bill from a discovery vendor.

>>**CHIEF JUDGE LAUTEN:** So some of the mediators that I have talked to have indicated that the skillset and the approach, the kind of intellectual approach to mediation is so different than litigation. So in litigation, it's discovery issues and sometimes discovery battles and procedural maneuvering and zealous advocacy on behalf of your client. And in mediation sometimes it's not about, did we get every single document, but your case is set for trial and your child has a major illness and that's a major factor in whether this litigation goes forward or not. So sort of things that are different than the actual litigation. Is that – do you find that to be true? Is it like lawyering or is it a completely different skillset?

>>**MR. KOLIN:** I think – well, I try – I try to tell the lawyers not to be in there to lawyer, but rather to advise, to be the counselor at law that we all are and to try and not use it as an adversarial process which we're all attuned to doing as trial lawyers, but rather –

>>**CHIEF JUDGE LAUTEN:** Can you break them of that?

>>**MR. KOLIN:** Well, it's a habit.

>>**CHIEF JUDGE LAUTEN:** That's engrained in them.

>>**MR. KOLIN:** So I say, the thing that trial lawyers do is prepare. So the best thing that you can do for mediation is prepare. And the parties that know more tend to do better. It's not a contest; it's not you know who wins. It's win-win if we can and the idea that the lawyer can't check that stuff at the door, I think that sophisticated lawyers can. I think they know more and more how to use the process because many of them are certified. Not that they've done a mediation, but they're certified. And they kind of get that there's some psychology to it, that they have to let their client say their peace. That they can use the mediator to help even between the lawyer and client sometimes, manage expectations, you know, give a realistic picture, those kind of things. And there's processes that are even more extreme, like early neutral evaluation where you invite the lawyers and their parties in and you tell them, you size it up early. So it's something that happens. There is one pilot program in the northern district of California and I've been trying to get the middle district over here of Florida interested in it. But it's a way of saying, you know, what I think a judge mediator might want to do and say, hey people, I've seen this case a million times. This is how it comes out. Are you sure you want to go there? Which we're really not allowed to do.

>>**CHIEF JUDGE LAUTEN:** Right, I didn't think you could do that, but I kind of think the temptation to do that, especially for former judges, is just tremendous.

>>**MR. KOLIN:** I imagine so.

>>**CHIEF JUDGE LAUTEN:** I've tried, you know, 50 of these cases and 40 of them have gone this way and ten have gone the other. Interesting. Why should people go to mediation? I mean, why not just keep litigating it?

>>**MR. KOLIN:** There's nothing to lose, Judge. I think that you know, the process, like I said before, it has so many variables and that you never really know until you engage in it what might come out of it. So a needle in a haystack from discovery, an impression of a client that was only ever seen in a suit report before, a real three dimensional picture of someone, a victim, an injured person, maybe a CEO or CFO, somebody who can explain how we got to where we got. So it's that interaction and that's really why we love when the judges say, you know, everybody has to be there in person. Sometimes they get, you know, there's logistics involved, we understand they get to go by phone. But going by phone for me is very difficult. I can't look somebody in the eyes, and that person has to have the ultimate authority obviously for the client and sometimes it's a corporate client. And it's very hard when Sally at extension 800 is your contact and you just can't engage with that person and get the case settled.

>>**CHIEF JUDGE LAUTEN:** Yeah, I would think phones or maybe even video, but certainly phones dehumanize people. When you put them in a room together, all of a sudden you're dealing with a human being who has emotions and thoughts, and feelings like you do.

>>**MR. KOLIN:** And distractions, we don't know what's going on at this person's desk and we also project onto this person what they look like, what they're doing. Are they paying attention to me? You know, and I do think we do some with video and I notice this room is set up with one of the Cisco systems, and there's a lot of technology but we're still – the human element is really what makes mediation valuable. It's bringing those people together in person that yields results.

>>**CHIEF JUDGE LAUTEN:** Are there any cases or types of cases that in your experience just don't tend to be successful at mediation?

>>**MR. KOLIN:** Okay, so as you know we're in the 5th District and since 2001 I've been a mediator for their appellate program which is now formalized, but was then a pilot program. And surprisingly, we have a 30 percent or so success rate. You'd have the check with Judge Palmer, but he used to keep a handicap on it. But I think about a third of those cases actually resolve and appellate cases, you would think the person that win's, hey, I'm done.

>>**CHIEF JUDGE LAUTEN:** Forget it, right.

>>**MR. KOLIN:** Yeah, you know, go pound sand. We have 80 percent performance rate, you know, this isn't happening but often the issues on an appeal can be about attorney's fees, can be sometimes a legal issue that a company may not want to set a precedent and have an appeal out there that affects hundreds of other cases. So there's lots of things that we can do that aren't actually about that controversy that yielded a result in a settlement.

>>**CHIEF JUDGE LAUTEN:** So your background intrigues me a little bit. I know you went to Trinity College in Hartford, but then you also spent a year at NYU, given a certificate in film before you went to law school.

>>**MR. KOLIN:** Yeah, I made a Super 8 film, you know, and as a child I had the video cameras. And in high school, I actually had gone to my 30th reunion, I can't even believe that, and had this, you know, Winter Park High year look as they called it. It was a video montage of everything that occurred in the 80s. So yeah, these kind of things were interesting to me and I think as a lawyer, I gravitated toward the entertainment – I was actually on the entertainment and sports law review at Miami, and I got to represent some film makers and some musicians, and

things like this. So it's bringing creativity to the law, I've always enjoyed. And this is one of the things that you're doing right now with this Podcast.

>>**CHIEF JUDGE LAUTEN:** Well, that's true. This is kind of neat for us.

>>**MR. KOLIN:** It's pretty neat, thanks.

>>**CHIEF JUDGE LAUTEN:** But lawyers are trained in many different ways, but one of the things that lawyers are trained to do is to discover historical facts. Like what are the historical facts? And then what is the legal dispute about those historical facts? How does the current state of the law apply to those? And then present those historical facts in a way the jury or judge understands them and then the application of the law, and then the judge or jury, the fact finder makes a decision.

>>**MR. KOLIN:** Right.

>>**CHIEF JUDGE LAUTEN:** What skill set does a mediator have that you wish you had known about years ago? What kind of talents and skills do you think best help neutrals?

>>**MR. KOLIN:** Well, I think that lawyers need to take more time to listen and I'm sure I was guilty of not doing that as a person, and then of course training helps to check those native instincts. That the lawyer is a storyteller. I think mediators sometimes interpret stories for the other room, in the other caucus, and maybe tone down some of the rhetoric and get people to see past the posturing and the filtering. So it's a very human business. I think it's very personality dependent. There are some mediators that are very heavy handed; there are some that are, what are they called, number shufflers, or you know, and I don't think I fall in either category. But I think everybody has their own style. And I think lawyers know that. They know this case this mediator. It's personality dependent and it takes two yeses, Judge, and I think people forget that.

It takes, you know, one side proposing, let's use Fred Lauten and the other side saying yes or no, don't like him or whatever, and it's sort of a personality pick. And then there are other lawyers that are like, just give me one, you know, like the lawyers you probably see in jury selection, pick six and go, you know. So that also depends on the style of practice, but it does take two yeses to get someone to use you, so it's a little difficult. It's not making one sale, but two.

>>**CHIEF JUDGE LAUTEN:** And it strikes me that in one way, there's more competition for mediation firms or mediation individuals than there's ever been. In other words, it seems to me there's more mediators than ever before and they're sort of competing for the business with one another. What impact if, A, is that correct? And B, what impact?

>>**MR. KOLIN:** I think there are more mediators than ever before. I'm sure the certification was vastly increased by the fact that non-lawyers became certified. So the Florida Bar, for instance, has started an ADR section so I'm on the executive council of that. I also founded an ADR committee here in the Orange County Bar Association, and I should mention while I mention the Orange County Bar, that they are doing free mediations for Hurricane Irma victims. And you go to the Orange County Bar.org on their website and you can make an appointment.

>>**CHIEF JUDGE LAUTEN:** Say that again because I might have stepped in that. It's very important. Would you just repeat that?

>>**MR. KOLIN:** So for victims of Hurricane Irma, if you're having a dispute with your neighbor or your insurance company, they're offering from the Orange County Bar a citizen dispute program to have free mediation. You can contact the bar; it's at www.orangecountybar.org. And I would definitely check that out if you're in that situation.

>>**CHIEF JUDGE LAUTEN:** Great, wonderful. Thanks. Well, I'd like to end with this question. What did you enjoy more, trial work or mediation work, or is that an unfair question? You can dodge it if you want.

>>**MR. KOLIN:** I think the thrill of you know, cross examining someone during a jury trial cannot be matched, but I do think a hug at the end of a mediation is pretty damn close.

>>**CHIEF JUDGE LAUTEN:** Okay, very good. Well, great, thanks for joining us today and I hope our listeners have learned about mediation. You know, if you don't work in the field, you might not realize that so many cases as we said earlier don't end up in front of the judge or a jury for trial. And I said earlier 98 percent of civil cases settle. Interestingly enough, about 95 percent of criminal cases settle through pleas between the parties. So sometimes lay people, I mention these numbers and they're shocked. They figured maybe it was 50/50, half the cases go, half of them settle. We would need to quadruple the size of the courthouse and judges if that were true. Most cases settle and mediation is one way to settle a case. And it's a very popular way, and it's a very productive way so I want to thank you for what you do for litigants and your help to the court because it helps when you're successful and we can close a case and move on to the next one. And I want to thank you for spending some time with us and sharing your insights. Thanks.

>>**MR. KOLIN:** My pleasure. Thank you, Judge.

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