PRACTICING CURIOSITY: A dying art that needs to be revived
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-Mark LeHocky

A litigator turned general counsel turned mediator shares the strategic advantages and savings of challenging the same old, same old.

If you spend much time with children, you know that they are both adept and perfectly comfortable at asking basic questions: *Why is the sky blue? Why do I have to go to bed?* Thinking about assessing, managing, and resolving disputes, we older folks can all benefit from asking more "why" questions, rather than assuming whatever is before us has been well thought out.

I was able to test this strategy in three general counsel roles, each with similar results and benefits. Let me explain.

With no prior in-house experience, I was hired as general counsel by a prior client — already a Fortune 1000 company but lacking any in-house attorneys. After cautioning that I really didn't know what general counsel do, my first CEO said simply "you'll figure it out". That feedback was emboldening, which I took as permission to go back to basics, referred to here as practicing curiosity.

As you might suspect, a new GC typically inherits an array of active and threatened disputes — some bigger and more disruptive than others. Stepping into my first GC position and two that followed, my process was the same: Review each matter bigger than a bread box in order to assess — internally as well as externally — whether we were on the best path.

Interestingly, the results of that review were nearly identical at each company: Most of the time our legal position appeared strong — the "good" disputes; some were less clear as to the course we were on compared to other possible avenues — the "ambiguous" disputes; and some appeared to make little sense, measuring our prospects of winning and the anticipated costs of getting there — the "bad" disputes.

Less clear in all three categories was why we were actively litigating rather than trying to resolve the matter promptly via direct negotiation or

mediation. So, we instituted the rule of practicing curiosity — both internally and externally.

Thus if our legal position appeared "good", why not show the other side our best case right away in order to prompt a compromise that reflects that reality? As well, even if confident about our position, why not find out from the other side if we have missed something important? (It does happen from time to time.)

Similarly, If our position is "ambiguous", why not talk directly with the other side to better understand what they see differently? If they have information to support their contrary view, aren't we better off knowing that sooner rather than later? Conversely, if *they* in fact miscalculated, aren't we better off showing them our best case now before direct and sunk costs grow all around?

Finally, if the dispute appears "bad" for us from the outset, why do we think it will improve — rather than metastasize — over time? More specifically, how will kicking the can down the road produce a better net result for us, factoring in direct legal expense and indirect people and disruption costs?

Thus, all of these categories warrant engaging early and often with the other side — practicing genuine curiosity *as well as* sharing information. Think "show *and* tell"; you can't be effective without doing both. In all instances, doing so dramatically reduced the average direct and indirect costs and time needed to resolve most disputes when compared against prior periods when the companies followed the same old, same old litigation path.

Importantly, practicing curiosity does not mean immediately defaulting to mediation for many disputes. While an experienced mediator can facilitate an exchange of information and in turn help settle the dispute, direct exchanges between adversaries may suffice to strike a deal.

As we learned, some disputes still require a third party neutral. However, prior and direct dialogue between adversaries regularly helps everyone best prepare for the mediation. Particularly when other constituents or decision-makers are involved — senior executives, insurers, family members, etc. — pre-mediation direct dialogue allows everyone to be

realistically handicap upsides and downsides, improving the prospects of a mediated outcome.

So why isn't this done all the time? A few proffered reasons, along with their failings:

For strategic reasons, we can't detail our claims and defenses early on. Indeed, situations exist where one side doesn't want to disclose their position until after a key deposition or two is taken. But those situations are rare in the real world. Typically, skilled counsel and clients anticipate arguments and alleged facts, so the direct dialogue can proceed early on.

For 'precedent' or 'principle' reasons, we can't talk settlement. In truth, most situations are unique, and no real precedent is at stake. As well, the purported 'precedent' may turn out to be a bad one, depending on how the litigation ends.

The 'principle' argument similarly is overused, predicated on the notion that a win here will deter other similar claims. But no data exists to support that premise; I know after asking for it over decades in the mediator's chair. As importantly, competent counsel generally won't be deterred in pursuing a meritorious claim despite how a prior case ended.

The other side won't listen to reason. It is true that experienced counsel sometimes discourage early settlement talks because the other side has been unreasonable or obstreperous, citing examples of satellite disputes or uncivil behavior. But we decided to plow forward anyway, with typically positive outcomes.

Aided by a mediator skilled in managing the room as well as the case assessment, the promised bad behavior rarely surfaced. Indeed, skilled counsel are typically skilled in valuing disputes. Armed with the key facts and a neutral's perspective, the dispute usually heads toward the appropriate valuation. Time saved; money saved; sometimes people saved as well.

The trend away from early and substantive dialogue between adversaries has been costly in all these terms. But it can be reversed. Channel your inner child. Ask the most basic "why" questions from the outset — of your

folks *and* the other side — and keep asking them. Show and tell does work.

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Mark has been repeatedly named a Best Lawyer in America for Mediation and was voted Mediation Attorney of the Year for the San Francisco area for both 2024 and 2022 through BestLawyers' peer-rating system. Mark also teaches at U.C. Berkeley's School of Law on the intersection of law, risk management and effective decision-making.