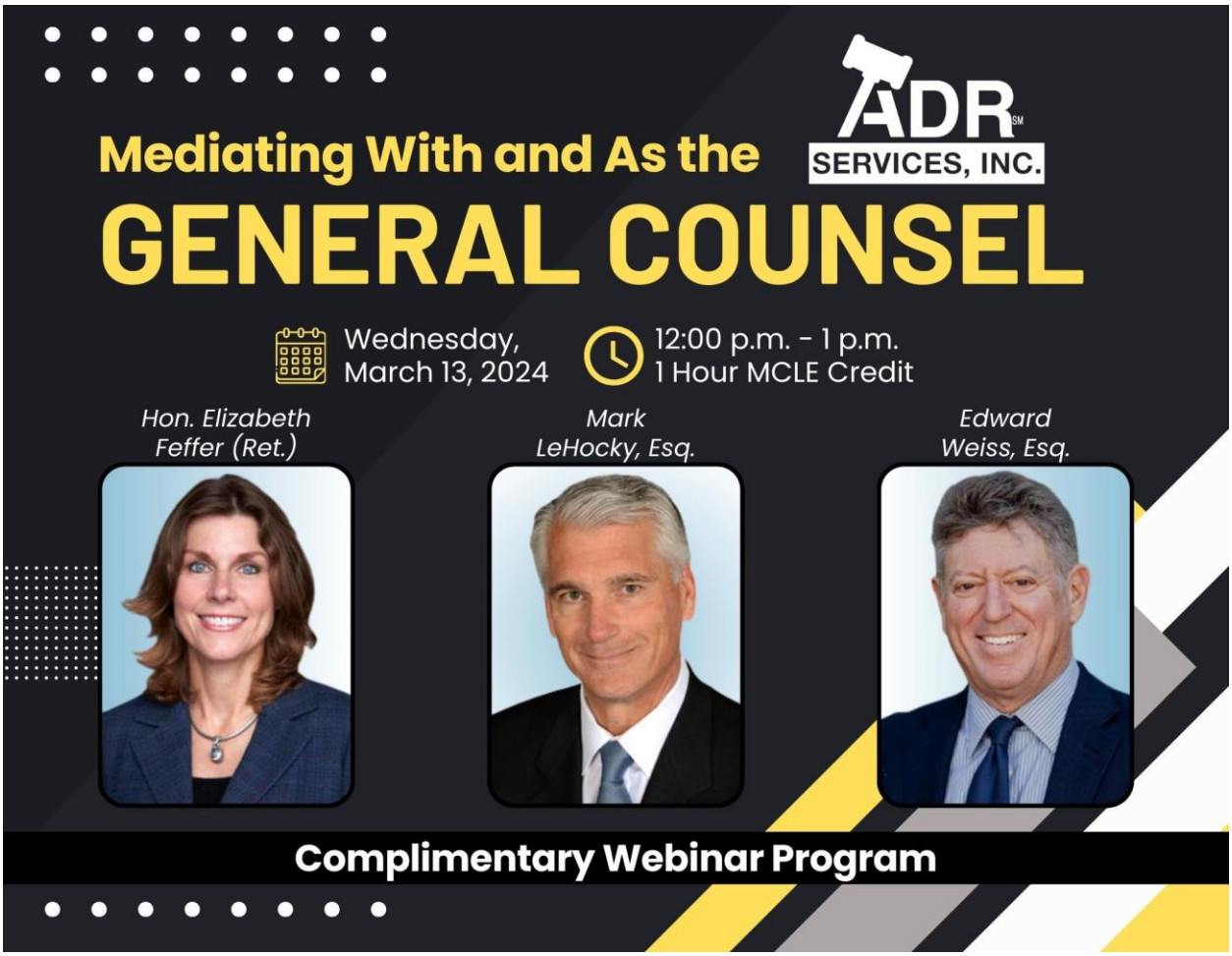

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2. *Practicing Curiosity: A Dying Art That Needs To Be Revived* (BestLawyers' Best Law Firms — November 1, 2023) Mark LeHocky, Esq.
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Agenda

- Topic 1: Types of General Counsel
- Topic 2: Mediation Issues with GCs
- Topic 3: At the Mediation
- Topic 4: Pitfalls to Settlement & Potential Consequences

Speakers

Hon. Elizabeth Feffer (Ret.)

Over her 13 years of judicial service, Judge Feffer presided over more than 75 civil jury trials, more than 500 civil bench trials, hundreds of evidentiary hearings, and numerous settlement conferences. In addition to her civil court assignments, Judge Feffer served four years in the Family Law Division, where she presided over and issued rulings on thousands of cases involving all types of complex family law matters. Lauded for her eloquence and exceptional legal knowledge, Judge Feffer is known for her thorough preparation and ability to connect with litigants. Her patience, compassion, and dedication have helped establish her reputation as an even-handed and esteemed jurist. Judge Feffer specializes in employment litigation, professional liability, personal injury, elder abuse, products liability, business litigation and partnership disputes, real estate litigation, land use litigation, eminent domain, insurance coverage, insurance bad faith, and entertainment cases.
Email: judgefeffer@adrservices.com
Case Manager: Ella Fishman – ellateam@adrservices.com

Mark LeHocky, Esq.

Mark LeHocky has been resolving hundreds of cases nationwide for over 30 years by bringing several varied perspectives to his work: as a complex litigation attorney representing both plaintiffs and defendants; as a public company general counsel managing all types of litigation and ADR initiatives; and as a full-time neutral now with ADR Services, Inc. Mark's unique background allows him to identify strategic opportunities and frame disputes in the overall context of business realities, individual and organizational relationships. For his ADR work, Mark was recently voted Mediator of the Year for the San Francisco Area for the second time through the BestLawyers(c)'s polling of top-ranked attorneys. Mark also teaches at UC Berkeley's School of Law on the intersection of law, risk assessment and decision-making.
Email: mark@marklehocky.com
Case Manager : Katy Jones – katy@adrservices.com

Edward Weiss, Esq.

Edward J. Weiss, Esq., a highly accomplished attorney with over 30 years of diverse legal experience, is renowned for his expertise in mediating and arbitrating disputes. Since 2021, he has committed his full attention to dispute resolution, also volunteering as a mediator for the Los Angeles Superior Court. A former federal prosecutor, trial lawyer, and business leader, Mr. Weiss has excelled in antitrust, business, employment, entertainment, intellectual property, real estate, and securities law. His extensive background includes an 18-year tenure as General Counsel for Ticketmaster, where he played a pivotal role in navigating complex litigation and safeguarding proprietary technology. Mr. Weiss holds a J.D. from the University of California, Berkeley, School of Law and an A.B. in Political Science from the same institution.
Email: eweiss@adrservices.com
Case Manger: Chelsea Mangel - chelseateam@adrservices.com

PRACTICING CURIOSITY: A dying art that needs to be revived
[BestLawyers' *Best Law Firms* —November 1, 2023]

-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.

Mark LeHocky is a mediator and arbitrator with ADR Services, Inc. and a nationwide ADR practice. He previously served as general counsel to different public companies, and before that spent twenty years litigating complex antitrust, intellectual property class actions, and other business disputes.

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.

Staying Curious: Early Dispute Resolution Programs That Deliver

Mark LeHocky

Best Law Firms 2017 (7th Ed.), U.S. News & Best Lawyers, pp. 32-35

It may be coincidence, or the luck of the draw. But after stepping into the general counsel role in three different situations, I was struck by the similarities as I inherited the existing piles of pending lawsuits and brewing disputes. After reviewing those matters bigger than a breadbox in terms of dollars, internal or external sensitivity, I noticed that almost all fell into one of three buckets, which I label the "good", the "bad" and the "unclear". We also learned that each category – and our companies' fortunes – regularly improved by taking a different approach to dispute management. With the added perspective of years mediating disputes of all of these types, I can attest to the value of early efforts to diagnose and mediate all disputes, as well as the adverse consequences of not doing so.

Let me first explain my terms. "Good" disputes were those which made perfect sense in terms of the litigation strategy adopted, our apparent prospects and the alternatives that existed (or didn't). "Bad" disputes were the opposite – disputes with dubious prospects and much expense and distraction ahead, particularly when juxtaposed against the apparent alternatives to end the dispute. Finally, the "unclear" disputes were just that – matters where we didn't really know enough to confidentially handicap our prospects or the available alternatives.

What our experiment proved was that each of these categories of disputes benefited from a disciplined early dispute resolution (EDR) program, combining active dialogue with our adversaries with early mediation efforts if the direct dialogue didn't fully do the trick. The "good" cases could be leveraged early to educate the other side, reset expectations, and drive the best resolution without further ado. The "bad" cases, if properly diagnosed, could be compromised early on, before bad becomes much worse. As well, active direct dialogue, followed up with mediation if needed, provided the clarity needed to adequately diagnose the "unclear" category.

So we tinkered. Rather than sticking with a traditional litigation course with substantial motion practice and extended discovery followed by later stage efforts to mediate on or near the courthouse steps, we designed and employed an EDR program consistently to all new and pending disputes. For clarity's sake, "disputes" include not just filed lawsuits but matters threatened as well, based upon years of observing that it is rarely too early to intercept a lawsuit in the making, regardless of whether we sat in the plaintiff or defendant seat.

As we began crafting our EDR program, we also developed benchmarks to measure it against the traditional litigation model. The ultimate benchmark was the bottom line in terms of direct and indirect cost to the organization. To ruin the surprise a bit, the results exceeded our expectations and in turn helped us gain support for additional resources and initiatives. From those efforts, we developed the following seven principles of a successful EDR program:

1. **Measure everything.** Any new initiative should be measured against meaningful metrics. Yet some companies use benchmarks that may present a misleading picture of success. In the quest for reduced legal spending for example, some organizations seize on one or more individual criteria of savings – such as the average hourly rate paid to outside counsel, the total number of in-house headcount, or the total number of retained outside law firms. With a "less is better" imperative, those metrics can produce false positives as to *net* savings when everything is counted, including the total number of hours billed, penalties, judgments and settlement payments.

   As an alternative, we developed a total delivered cost (TDC) per matter by category of dispute matter – for example, individual employment claims, class claims, copyright and trademark claims, ADA claims. The TDC metric counted everything we reasonably could, in terms of outside legal expense, an allocable portion of of our in-house legal team's cost, and all monies paid in judgment, settlement or penalties of any type. Indirect costs such as the loss of time, company personnel and resources, were not explicitly measured, but were certainly part of the discussion. As it turned out, those indirect costs were not even needed to make the case that a robust EDR program greatly reduced the company's cost per matter when compared to its prior method of litigating.

2. **Impose a one-week rule:** Delays in assessment and communication with the other side often produce their own false positives in the handicapping process, as things often look better until you kick the tires hard. Individuals and groups circle together and agree with each other too easily as to why we are right and the other side is wrong. To avoid this pattern of positions hardening around an early yet incomplete assessment, we tasked ourselves with reporting back quickly as to what we confidently know, we don't know, and what additional information may really help – all within one week. The mantra was to be prepared to brief the CEO or the Board, avoiding firm pronouncements without the facts or investigation to truly back them up. In most cases, neither the CEO nor the Board got involved early on, but this mindset institutionalized rigorous testing and retesting and flagged core areas for follow up. If that preliminary read raised any doubts, we began surfacing them internally before positions hardened further and other options evaporated.

   Of course, certain matters need more than seven days for a preliminary assessment to be valuable. But we treated those as the extreme exception, rather than an easy out. The case had to be made as to why we couldn't complete this preliminary assessment. Even for large matters, there was always valuable work to do right away to clear up the unclear and confirm strengths and weaknesses.

3. **Talk to the other side early, directly and frequently:** While this may sound obvious, the trend in litigation practice has been away from direct conversation – meaning face to face or telephonic exchanges – in favor of position statements reflected in letters, emails and pleadings. But those formal communications are not conversations, and they all suffer from the one-sidedness they are built upon. Rather, we insisted upon direct conversations –

through our in-house lawyers and our outside counsel – with the other side. We pursued a substantive exchange as to key facts and what they suggest: *We would like to better understand your position and share preliminary information that may clarify or correct some initial impressions on both sides.* That's all it normally takes to get started. And while it might take more than one conversation, the effort consistently paid off.

4. **Prepare for Resistance On Your Side and Misunderstanding from The Other Side:** Anticipate and address concerns from your side about early and substantive discussions with the other side. Keep in mind that the other side is usually blamed for the problem in the first place, whether you are the plaintiff or the defendant. To allay those concerns, focus on the benefits of learning more *regardless* of whether the early dialogue prompts an early settlement. Both sides are better informed as to the key facts, strengths and weaknesses, which often prompts an informed and reasonable resolution. But even if it doesn't, you are better prepared for the trial or arbitration that follows. Further, in most cases, the scale of the remaining dispute is less cluttered with expensive and distracting forays into the irrelevant and unimportant.

   Engaging the other side early on may also trigger misimpressions. An adversary may assume that you are concerned about your position, and hence are raising the white flag. No reason to fear, as long as you handle the conversation correctly. Indeed, the hallmark of confidence is talking directly with the adversary, explaining why you believe that you will prevail if the matter is fully adjudicated, while also asking for any information that may change your side's assessment. Here, it certainly helps to explain that you routinely follow an EDR program that prompts these early and thorough exchanges. *Nothing peculiar about this matter; it's what we always do.*

5. **Mediate *early***: While early, direct and ongoing engagement is essential to reaching a reasonable accord, we sometimes still need help. Despite best efforts, the other side may discount your information and you because you are…well… the other side (and they blame you for the problem at hand). So we mediate, and do so early on, while the number of alternative solutions are greater -- e.g., reinstatement, repair, new contracts, licenses – and the sunk costs have not yet grown into a counterweight to a reasonable accord.

   Here, expect more resistance from your own side: *It's too early. We haven't taken all the discovery. The other side hasn't been reasonable so far; what will be different at the mediation?* Well actually, a lot. A reputable mediator is by definition neutral. Hence they won't be tainted by the bias attributed to your side. The mediator can also help the parties negotiate informal exchanges of key information and sort out what is really unimportant, whether in a single early mediation session or a staged process that will cost everyone a small fraction of what the traditional litigation path promises. Finally, from nearly two decades serving as a mediator, I can confirm that the predicted bad behavior of the past typically does not rear its ugly head in the course of mediation. More often, the foreshadowing of out of control clients and attorneys is tempered by the realization that a civil discourse is essential to getting the best deal done. (For a deeper dive on overcoming

client and counsel resistance to early mediation efforts, please see my prior article "Navigating the Litigation Conversation: Confessions of a Litigator Turned General Counsel Turned Mediator", *Best Law Firms 2016 (6th Edition), pp. 50-11, U.S. News & World Report – Best Lawyers©*).

6. **Approach mediation as a conversation; not moot court:** Notice a theme here? As we all know, mediation is a consensus-driven process, unlike trial or arbitration. Nothing good happens unless everyone agrees. Focus on the virtues of mediation over traditional litigation, including (a) the opportunity to educate the other side as well as learn things that may shift *your* side's view; (b) the chance to persuasively advocate in mediation; and (c) the real opportunities that joint mediation sessions present.

   Leave the invective and incivility at home. Great advocates practice neither. To the contrary, they seize the opportunity to talk directly to counsel and client on the other side. Tell a compelling story that may resonate with the judge, jury or arbitrator. Show the other side that you are neither the simpleton nor malcontent that maybe, just maybe, you have been described to be. Keeping in mind that we are all hardwired – clients and counsel – to discount bad facts and the people who share them, and concurrently overweight our prospects for success at trial, the mediation process allows us to break down misconceptions and reset expectations. It works best if we talk, rather than vilify.

7. **Define success based upon speed toward resolution, rather than wins.** Wins, like perceived precedents, are often overrated. A few battles need to be fully waged, but most do not. Most disputes are not likely to recur, or to prompt useful precedents. The notion that any case outcome will really dissuade others is unsupported by any empirical evidence. Indeed, a focus on wins often produces Pyrrhic victories *if* you prevail, and far worse if you don't.

   Rather, we assessed potential settlements based upon the realistic prospects of success and the total cost of litigating to the end, measured by direct and indirect costs. Indirect costs – loss of time, resources and focus – unfortunately often get short shrift in the mediation conversation. However, they often have great impact on companies and individuals, generating non-productive behavior of their own. The most successful mediation preparation and sessions depend upon setting reasonable expectations based upon realistic scenarios, which all flow from active and early use of robust EDR programs.

Mark LeHocky is a former litigator specializing in complex business disputes, the former general counsel to different public companies, and a full-time mediator and arbitrator with ADR Services, Inc. Repeatedly voted among the Best Lawyers in America for Mediation by Best Lawyers©, Mark also teaches at U.C. Berkeley's Haas Graduate School of Business on the intersection of law and business decision-making. His full profile is at www.marklehocky.com.

Mark LeHocky
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Rethinking mediation with behavioral-science data

USING BEHAVIORAL-SCIENCE DATA RATHER THAN WISHFUL THINKING TO MAKE MEDIATION MORE PRODUCTIVE

"I will look at any additional evidence to confirm the opinion to which I have already come." — Lord Molson, British politician (1903-1991)

Lord Molson was onto something. Behavioral scientists have confirmed as much. Now it's time for the rest of us to begin using that science to make mediations more productive.

First, the science: A growing body of behavioral research shows how lawyers and clients – indeed all of us – process and filter information, weeding out unwanted input in favor of self-serving affirmations. In other words, we hear what we want to hear and largely disregard the rest. Call it egocentric or self-serving bias.

These patterns are as real for organizations as they are for individuals. Take this as gospel from a litigator turned general counsel turned mediator: Groups often model the very same behavior, particularly when dealing with adversarial or unexpected events. More on this later.

Notably, modern civil mediation practice seems to have taken a contrary course, reducing rather than enhancing everyone's chances of success. Common practice today includes limited pre-mediation dialogue about the merits, mediation statements that are not shared or mimic trial briefs in tone and temperament, and the absence of joint sessions at the mediation itself.

The goal here is to promote a form of mediation advocacy that embraces the

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behavioral science and maps a different course. After two decades mediating and prior litigation and general counsel roles where these concepts could be tested, I can tell you they work.

Client perceptions and overconfidence: Tell me what I want to hear, not what I need to hear

A growing number of behavioral studies focus on how clients filter information they receive, holding onto the information that affirms pre-conceived notions much better than the data that casts doubt. (See, e.g., Donna Shestowsky, PhD., Professor of Law at the University of California, Davis, School of Law, *The Psychology of Procedural Preference, How Litigants Evaluate Legal Procedures Ex Ante,* Iowa Law Review, Vol. 99, No. 2, pp. 637-710 (2014); See also, George Loewenstein, et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining,* 22 Journal of Legal Studies, pp. 135, 149-53 (1993).)

In one study, litigants involved in various forms of dispute resolution (trial, arbitration, mediation, etc.) were asked to rate the fairness of those different procedures as well as their own chances of success. In addition to confirming that clients prefer dispute resolution processes like mediation where they maintain the most control, this study revealed that 57 percent of litigants believe that they had at least a 90 percent chance of winning, while roughly 24 percent believed they had a 100 percent chance of winning. I confess to having picked law school in part because there was little math involved, but even I know those numbers don't add up. These findings reveal an egocentric bias, where litigants construe information in a self-serving way, and in turn believe that their case is much stronger than it really is.

Attorney handicapping: the dangers of wishful thinking

Attorneys often fare no better than their clients as to handicapping skills. Multiple behavioral studies reveal that lawyers routinely overestimate their client's litigation prospects – i.e., the likely outcome at trial – compared to the actual outcome if the case is fully tried. (See, Randall Kiser, *Beyond Right and Wrong, The Power of Effective Decision Making for Attorneys and Clients* (Springer 2010), pp. 29-48. See also, Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, and Elizabeth Lofthus, *Insightful or Wishful, Lawyers' Ability to Predict Case Outcomes,* Psychology, Public Policy, and Law, 2010, Vol. 16, Nos. 2, pp. 133-157.)

In one set of studies – repeated over different time periods in both California and New York – plaintiffs on average erred in their assessments more often than defense counsel. Specifically, plaintiffs often left money on the settlement table – comparing what they turned down in pre-trial settlement offers to the eventual outcome – reflecting a 60 percent error rate for plaintiffs versus a 25 percent error rate for defense counsel. (Kiser, *Id.* at 42.)

While this data initially sounds encouraging for defendants, it has a dark side. Specifically, while plaintiff's average cost of decision error was $73,400, defendants' average cost of error was over $1,400,000 – 19 times greater. (*Ibid.*) Thus, fewer errors, but exponentially costlier when they hit, both in terms of financial losses and client relations.

Making use of the behavioral science data in the mediation process

After two decades of litigating on behalf of plaintiffs and defendants, I started my first general counsel position. There I inherited a large number and variety of pending disputes – a pattern that repeated itself in two other GC roles. In each position, I began sorting through how we were handling our cases, including how much we really knew with confidence, how much had we shared with the other side, and what alternatives existed to resolve these disputes.

As to many matters, our current course was well-informed and made great sense. As to others, not so much. The litigation path we were on was usually by the book, was requested by the client, and may well have eventually worked in court. But the same questions consistently arose: Did we really know all the key facts? What did the other side see differently? If something was amiss as to our own assessment or theirs, wasn't it better to sort that out sooner versus later? And did we really need to win or simply to make the dispute go away?

By this time, I had also started mediating at the request of the federal court in San Francisco, and began exploring the behavioral sciences as to how individuals and organizations make decisions about pending or threatened disputes. Then, triggered by these and earlier studies of how people respond to adverse or catastrophic events, we began experimenting with early dispute resolution programs that channeled the findings discussed here. The major steps incorporating these lessons follow, all tested through the practices we employed.

Pre-mediation substantive dialogue

When asked, any litigator will say that they talk to opposing counsel several times before a mediation takes place. Now ask the same litigator how many times they have had two or more substantive pre-mediation discussions of strengths, weaknesses and alternatives – in person or on the phone (self-serving letters and emails don't count) – and you often get a different answer. It may be resistance to sharing too much information; it may be the notion that substantive merits discussions are best left to the mediation itself. Either way, a deep dive into the substance of each side's position is often delayed until the mediation itself.

The behavioral data argues for the opposite course. Knowing that lawyers and clients view their prospects through rose-colored glasses, the earlier the substantive dialogue starts, the better. Even if the information offered isn't favorable, the sooner it surfaces, the sooner parties can start revising assumptions and re-examining their position.

This point is even more important as to claims against organizations with many actors in the mix. Absent substantive exchanges with the other side, groups

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often tend to coalesce around untested assumptions and unrealistic settlement expectations. Turning that ship around takes both time and substantive reasons to change course. Think ocean liner, rather than sail boat.

In both my litigator and general counsel roles, I witnessed the risks of the hermetically-sealed corporate meeting room. Like needed fresh air, contrary ideas and facts can be rare, discounted or discouraged, with bad results down the line when reality finally sets in. To avoid those results, we started requiring multiple substantive conversations between adversary counsel well before any mediation took place. The need for more and better information also trumped any notion of playing hide the ball. Our inquiry was simple: *What do you see differently than we do?* Obviously, the question needed to be accompanied by a genuine effort to share what we knew or didn't know. Otherwise, a meaningful exchange was unlikely.

Taking this approach consistently paid off. If our own assessment was thorough and revealed no major weaknesses, the pre-mediation dialogue often led to a negotiated outcome at an appropriate level. If, on the other hand, the pre-mediation dialogue revealed material bad news, we could then update decision-makers and reset appropriate expectations before the mediation. And for all the "grey" matters in between, all sides were better prepared for the mediation session to follow.

Sharing mediation submissions: Briefs?

We don't have to show you any stinking briefs!

With apologies to "The Treasure of the Sierra Madre," the failure to share briefs is a wasted opportunity, given the need to overcome ingrained biases and the time often needed to do so.

A well-constructed brief focusing on core facts, key legal issues and damage calculations should preview what a judge, jury or arbitrator will hear. If compelling, it should motivate the other side to set reasonable expectations for the mediation. By contrast, failing to share mediation briefs usually leaves the client with only their own counsel's brief to rely upon. That only reinforces self-serving biases, making it harder to reset expectations later.

Here, tone and temperament are key. To overcome self-serving biases and convince the other side to reassess, you must first be heard. A mediation brief laced with adjectives, invective and insults will assuredly trigger defensive posturing and counter-attacks on the other side, rather than a real exchange on the core issues. And it won't impress the mediator either. Believe me.

For what it is worth, the inclination to confuse an aggressive tone with effective advocacy appears to start early on. Maybe it's the many movies, television shows and books that value domineering behavior and discredit a dispassionate discourse. But it doesn't work; it's counterproductive; and it squanders a key opportunity to really be heard by the other side when being heard matters most.

Sharing briefs is arguably more important with multiple actors and constituents on the other side. Organizations with various stake holders, inside and outside counsel and insurers require consensus to set – and time to reset — settlement parameters. Shared briefs provide a substantive basis for reassessment as well as time to do so before the mediation starts. For anyone who has experienced a mediation session that needs to be halted and resumed later after that session uncovers key information that requires a new round of executive conversations, you know what I mean.

Finally, sharing briefs does not foreclose supplemental letters for the mediator's eyes only with any content deemed helpful but very sensitive. But the default should be to show more, not less. If truly impactful, it will help reset expectations and prompt the desired result.

Joint sessions: Think conversation, not conflagration

Joint mediation sessions provide the rare opportunity to be heard directly by the other side, to learn what the other side sees differently, and to dispel misimpressions about you and the strengths of your position. Then why have they fallen out of favor?

Discomfort with a potentially volatile dialogue prompts many attorneys to avoid putting adversaries in the room together. Indeed, most experienced litigators have one or more stories about a joint session gone awry — lawyers behaving badly, clients becoming irate or irrational, and mediators losing control of the room. But lost in these anecdotes is the reality that a properly conducted joint session is a prime opportunity to challenge assumptions and demonstrate that your story (or theirs) may play well before a judge, jury or arbitrator if the dispute does not settle.

Indeed, didn't we pick litigation as a career because we believed we were effective advocates? If so, we should be able to channel those skills during a direct dialogue with the other side, particularly if we treat the session as a conversation, rather than a conflagration. Invite conversation by explaining your position in the most fact-based, invective-free manner. Then ask, what's wrong with our picture? The combination of an insult-free presentation and genuine curiosity as to what the other side sees differently is most likely to overcome the biases of both counsel and client on the other side. Doing so should in turn significantly bridge the gap on an acceptable settlement.

Other arguments for avoiding joint sessions include the absence of clients with real control over the settlement – class actions, for example – and the perception that the adversaries are incapable of rational discourse. Here again, our actual experience produced much better results than predicted *if* we took the steps outlined here to overcome these pre-existing biases and unduly rosy assessments.

In the class-action area, for example, the absence of underlying clients with a significant voice rarely deterred a meaningful mediation if we held substantive pre-mediation conversations, exchanged

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useful information, and thoroughly and civilly briefed core issues. Indeed, skilled counsel proved very adept at assessing value, potential future sunk costs, and reaching an appropriate settlement with the aid of a capable mediator.

As well, predictions of obstreperous mediation behavior from the other side rarely panned out. Experienced counsel on both sides realize the downside of unruly behavior: It only undermines your credibility with the mediator as well as the prospects of overcoming biases and misimpressions from the other side.

Measuring success

When we began this approach, our primary benchmark was whether it reduced the overall direct cost of legal disputes in terms of legal fees, in-house costs, penalties, settlements. Turns out it did all that, and more. Beyond direct savings, the indirect cost of continuing to litigate in terms of lost client time and opportunities was significantly reduced. So were the number of unpleasant surprises and results from sorting out these problems later. Money saved; time saved; sometimes people saved as well.

Remember Lord Molson and give it a try.

Mark LeHocky is a former litigator specializing in complex business disputes, the former general counsel to two public companies, and a full-time mediator affiliated with Judicate West. He also designed and taught a course on Mediation Advocacy at the University of California, Davis' School of Law, based on the principles discussed here. Mark is also named among the Best Lawyers in America for Mediation by U.S. News/Best Lawyers© for three years running. His profile is on www.marklehocky.com.

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C-suite Conversant

Edward Weiss' general counsel experience is a strong suit, lawyers say.

By Shane Nelson
Special to the Daily Journal

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ADR Services, Inc. neutral Edward J. Weiss worked in-house for nearly 20 years at Ticketmaster.

"It was a very interesting, dynamic place," Weiss said of his time at the live-event giant. "I learned a tremendous amount about business and how the corporate world works. It really was a great hybrid experience of still being a lawyer and still working in the legal system but also being part of a highly successful, prominent business that was doing interesting, cutting-edge things."

A 1988 UC Berkeley School of Law graduate, Weiss started his legal career at Manatt, Phelps & Phillips LLP, litigating banking, entertainment, employment and professional liability cases. In 1994, Weiss moved to the U.S. Attorney's Office for the Central District, where he spent four years in the criminal division, handling jury trials involving narcotics, tax fraud, sports bribery, mail and wire fraud, illegal firearms and immigration law violations.

Weiss then moved in-house in 1998 to Ticketmaster, where he served as general counsel, chief counsel and executive vice president until 2017.

"I was very hands on with our litigation – managing it, directing it, being responsible for all of it," Weiss recalled. "And while I oversaw the lawyers who were managing the litigation at Ticketmaster, I also kept the more significant cases for myself to manage. ... I worked very closely with the lawyers that I hired and was shoulder-to–shoulder with them the whole way."

Weiss said his interest in private neutral work started when he took part as TicketMaster's general counsel in dozens of mediations the company was involved in.

"There's often a lot of downtime in the mediation process," Weiss explained. "And my mind would often go to, 'If I were to do this, how could I do it better? How could I do it as well?' In some cases, I found myself thinking, 'What is working?' or 'What's not working? What are some of the pitfalls – if I ever were to do this – that I should avoid?'"

Weiss started working full time as a private neutral early in 2022, first tackling disputes for the American Arbitration Association and later on as a mediator – after completing training at the Straus Institute for Dispute Resolution. Weiss joined ADR Services, Inc.'s roster in October of this year, and he said his caseload is about 60% mediation and 40% arbitration, involving business, contractual, intellectual property and personal injury disputes.

"It's more hard-core law," Weiss said of the work he does as an arbitrator. "Applying the law and the facts, really being on top of the law in the area that bears upon the arbitration and then being responsible for making a decision. I find something very appealing about all of that."

Irvine litigator William C. Kersten used Weiss recently as an arbitrator in a commercial dispute that ultimately settled, and described the neutral as very hardworking.

"He was very fair, and really allowed both sides to have their say,"

Edward J. Weiss

ADR Services, Inc.
Los Angeles

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Real Estate
Employment
Antitrust

Kersten said, noting Weiss did issue a ruling on an early motion in the arbitration involving complicated statute of limitation issues.

"He allowed supplemental pleadings on that issue," Kersten recalled. "He considered all the declarations and the pleadings and made a fair ruling that allowed us to go forward and get the case resolved. ... Sometimes you feel like the arbitrators don't hear you. But I got the opposite sense from him. He allowed enough time and really considered everybody's viewpoints before he ruled."

Before mediations, meanwhile, Weiss said he likes to receive briefs from all the parties and to speak over the phone with attorneys. That approach was something Chicago business litigator Robert H. Lang appreciated. Lang used Weiss recently to settle a contentious contract dispute, and he said the neutral's homework ahead of time made a substantial impact on the ultimate resolution.

"He spent a lot of time preparing and really getting to know the case," Lang said. "He knew the law that was applicable on both sides. He talked to both attorneys before the mediation, so we really started the mediations before we even walked in there. ... He just got right to it."

Noting that no two cases are exactly alike, Weiss said he tries to use his study of briefs and pre-mediation calls with attorneys to develop a tailored resolution strategy.

"It's not a one-size-fits-all approach," Weiss explained. "It's using whatever information I can elicit in the pre-mediation communications to determine what would be best for everybody."

Weiss added, however, that building rapport and trust with the lawyers and litigants is always important.

"The lawyers and the parties will be more receptive to an evaluation if there's a relationship that's been established and that foundation has been laid," Weiss explained. "There's a time and a place and a way to give an evaluation, but the evaluation is only going to be as useful and as effective as it is received by the litigants."

Weiss will also make use of mediator's proposals, but he noted that's a strategy he employs thoughtfully.

"One of the things I learned as a participant, or as a consumer of the process, in my years at Ticketmaster is that's an important tool, but one that has to be used carefully because a mediator's proposal can do as much harm as good," Weiss said. "It has to be used carefully and properly and appropriately – exploring first how that's going to be received and whether you're in the right ballpark with it. Otherwise, you could drive one side or the other to their respective corner and make it more difficult for them to settle the case."

Orange litigator Ryan R. Wong used Weiss recently to resolve a contract dispute, and he said the neutral's extensive experience as in-house counsel proved particularly effective during the mediation.

"I felt his skill set was especially helpful," Wong said. "He really knew contracts, knew what commercial parties should owe under the contract, whether the contract is reasonable, which sections and paragraphs are perhaps more enforceable than others."

Lang agreed that Weiss' extensive career in-house was a distinguishing strong suit.

"He not only knew the law that was applicable, but he had a really good understanding of the factual situation, and he understood the business," Lang said. "He definitely has a bit of a different background for a mediator. And when you're talking with somebody who's in that c-suite – and my client was a company president and definitely part of that c-suite – those people are talking a different language, but it's one Ed clearly understood. ... And that definitely helps."

Here are some attorneys who have used Weiss' services: William C. Kersten, Kersten & Associates; Robert H. Lang, Thompson Coburn LLP; Ryan R. Wong, BarthCalderon LLP; Wesley Schwie, Gallium Law LLC; Bert H. Deixler, Kendall Brill & Kelly LLP.