AGENDA

1. Introduction of Panelists
2. 3 Stages of Mediation Preparation
3. Preparing Your Client
4. Engaging the Other Side
5. Decision Makers
6. Other Factors
7. What Happens if We Don't Settle at Mediation?

HANDOUT MATERIALS ATTACHED:

1. *Effective Strategies for Representing Employment Plaintiffs at Mediation* by Ji-In Lee Houck
2. *Road to Somewhere: How Can Attorneys Take Steps to Improve Settlement Efforts and Avoid Unpleasant Surprises as they Map Out a Dispute Resolution?* By Mark LeHocky
3. *Rethinking Mediation with Behavioral-Science Data* by Mark LeHocky

Effective Strategies for Representing Employment Plaintiffs at Mediation

By Ji-In Lee Houck

In California employment cases, mediation has become a critical tool for resolving disputes. While veteran attorneys may recall fondly the days of informal phone calls or lunches to settle cases, structured mediations provide a platform to showcase advocacy and offer clients their proverbial 'day in court'—often the closest they'll come to trial.[1]

Employment cases are by nature emotionally charged cases. Our clients have been subjected to workplace discrimination, harassment, retaliation, or wrongful termination and they look to us as their lawyers and to the civil justice system to right these wrongs. While retelling and reliving traumatic experiences can be painful, it can also be cathartic and healing for our clients to have their lived experience validated at mediation. Through our advocacy at mediation, we can make our clients finally feel heard and seen and thereby empower them.

This article explores key strategies for representing California employment law plaintiffs in mediation, emphasizing preparation, a trauma-informed approach, and client-centered advocacy.

Prepare, prepare, prepare

These tips can all be folded into this first one: prepare. You are not maximizing the potential for the best outcome if you're throwing together a basic brief to give to the mediator late, talking to your client for the first time the day before the mediation, and showing up to the mediation hoping for the best. For most cases, you will not get a better opportunity to tell your client's story and argue your case than at mediation. Don't waste it.

Know your objectives

My primary objective in mediation is to assess whether a reasonable settlement is achievable given the circumstances of the case and the needs of my client. That means my goal is not always to make a deal.

Of course, there are cases where, for a variety of reasons, the goal absolutely is to make a deal. Perhaps the problems with the case mean it is not going to get any better over time. In fact, some cases may be worth more today than they are tomorrow because we haven't been forced to disclose certain bad facts yet. Or perhaps the client really needs to settle. They may not want to move forward with the case for their own personal reasons or because a settlement today would mean they get to keep their house from a bank foreclosure. Whatever the reason, it's our job as their attorney to counsel them regarding the potential risks and benefits of moving forward, and ultimately do what the client wants. We cannot lose sight of the fact that it is their case, their life, their decision.

Thankfully, for most of our cases, the goal is not to make a deal at any cost. Instead, generally my goal is to find out how much I can resolve the case for, determine whether that amount is within reason given all the circumstances of the case, and make a recommendation to my client accordingly. Ultimately, whatever number the defendant maxes out at may not be enough to recommend settlement and no deal gets done. However, even under those circumstances, mediation can still be worthwhile because we learn more about the case and the defense through the mediation process.

Understanding what a "win" looks like—whether it's a monetary settlement, a non-monetary agreement, or simply the opportunity to gauge the opposition's position—guides your approach throughout the mediation.

Choose the right time

Timing can be everything in mediation. If mediation occurs too early, before critical evidence has been gathered or key witnesses have been deposed, it can weaken your negotiating position. Conversely, waiting too long can result in both parties incurring significant costs, complicating the prospects for settlement.

Certain cases may be ripe for pre-litigation mediation because, for example, you

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Using a mediator that the opposing counsel proposed can make it harder for them to undermine the mediator during mediation.

already have key evidence. Defendants and their counsel may be serious about resolving cases when they know there is little they can do to rebut the damning evidence. In one sexual harassment case from recent memory, pre-litigation mediation was successful because we had text messages and photos from the harasser that the defense could not refute. On the other hand, pre-litigation mediation may be premature if you do not have the evidence yet and there are too many unknowns to bridge the gap. In these often "he said/she said" situations, you may try negotiating an informal exchange of evidence or it may be best to wait until at least some discovery has been conducted.

You will not get a better opportunity to tell your client's story and argue your case than at mediation. Don't waste it.

Pre-litigation mediation may also make sense when the client does not want to file a lawsuit. Again, we must respect our clients' wishes if they do not want to move forward. However, sometimes when a client thinks they do not want to file a lawsuit, it can often come from a place of fear of the unknown. Explaining the litigation process and comforting them with the knowledge that they have a strong advocate to fight the fight for them can often give clients the courage to move forward.

Mediation is often most effective after completing certain discovery milestones that clarify case strengths and weaknesses allowing both sides to better evaluate the claims and defenses. Sometimes that could mean after exchanging an initial set of written discovery and documents. Often it is after some key depositions are taken – for example, the plaintiff's, the decision-maker, and/or harasser. Consider mediation at each stage of litigation, before engaging in expensive discovery processes, such as taking all potential trial witnesses' depositions, expert discovery, and trial. On the one hand, avoiding these costs can create room for both sides to be more flexible with settlement figures. On the other hand, moving forward through each stage of the litigation and obtaining key evidence can increase the value of the claims. Each case is different and will require careful analysis at each stage of the litigation.

Choose the right mediator

The mediator you choose can significantly influence the outcome of your mediation. Consider the mediator's style, temperament, and experience. It is important to understand your client and your case, to determine what mediator may be best. Do you need an evaluative mediator to assess the case and provide feedback on its strengths and weaknesses? Do you need a facilitative mediator who focuses on fostering dialogue between the parties? Do you need someone who is particularly skilled at navigating insurance issues? Do you need someone who is tough in both rooms or someone who can show more empathy?

When it comes to mediators, rarely does "one size fits all" cases and clients. However, I find that employment cases often benefit from evaluative mediators. An experienced mediator whose opinions about the case are trusted by the parties can be extremely effective at helping the parties reach a resolution, especially when insurance carriers or risk-averse defense counsel are involved. Because I want confidence that the mediator will have influence in the other room, I will ask the defense to propose mediators. If, after careful consideration (including after consultation with my network of plaintiffs' lawyers), I determine that the mediator the defense attorney proposed is acceptable, I will often agree to use them. Using a mediator that the opposing counsel proposed can make it harder for them to undermine the mediator during mediation.

Meet with your client

Client preparation is one of the most critical steps in a successful mediation. Clients often find the mediation process intimidating, most having had little to no experience in legal settings. Clients who come into mediation without knowing what to expect may be anxious and scared, which for some people can manifest as anger, combativeness, or emotional withdrawal. This may result in clients not making the best impression on the mediator, who may be quick to judge

their credibility or likeability in their assessment of the case.

The first thing I do to minimize client anxiety is to schedule a meeting with my client. With most mediations these days happening over Zoom, I find it helpful to meet with my client using the same platform so I can make sure they feel comfortable logging on and using the features and that they are set up in an appropriate setting with good lighting and background. I will explain exactly what to expect from the moment they log into the mediation. I also explain that mediation is a confidential process to encourage parties to communicate freely.[2] I set realistic expectations regarding potential outcomes. Taking time to go over the mediation process with your client minimizes surprises and fosters trust. Fostering trust is crucial to reducing client anxiety and improving their ability to engage meaningfully.

I will also talk to them about the case and what I anticipate will be the defense arguments. Preparing them for these arguments is essential to minimize emotional harm at the mediation and gives you an opportunity to help clients manage their reactions.

I talk to my client about the emotional impact of defendant's actions. At this point in the engagement, I have hopefully fostered enough trust that they can be vulnerable with me and I can help take them back to all the raw feelings of when they were subjected to the workplace abuse. Emotional distress is often the biggest harm in employment cases. Preparing your client to explain how they have been harmed so it is authentic, raw, and real in the room with the mediator can have a huge impact on how emotional distress damages are evaluated at mediation.

Equip your mediator with the tools needed in the other room

If you want the mediator to work for you, you need to give them the tools they need to persuade the other side of the value of your case.

A well-prepared brief can set the tone for the entire mediation. Do not overwhelm the mediator with a long, verbose brief with a hundred pages of exhibits. Instead, include a concise summary of the case facts, key supporting evidence, legal argument (if it is something out of the ordinary – employment mediators don't need the law on the elements of a discrimination claim), and a realistic assessment of damages. To maximize the impact of my best evidence, I will embed screengrabs right into my brief so they cannot be ignored. The goal should be to write a concise persuasive brief that is easily digestible and impactful. To assist the mediator, I may also include a chronology of key events and a list of key players as cheat sheets for reference in certain cases.

Also, use your brief to introduce your client to the mediator and the defense so they can see them as a real person, not just a party to a lawsuit. Highlight your client's positive attributes, such as work history, community involvement, or personal achievements, to humanize them and increase empathy. Include pictures of your client. In a recent mediation involving pregnancy discrimination, I included

photos of my client proudly working during her pregnancy and even working with her newborn wrapped to her chest. Even if they aren't evidence of the pregnancy discrimination, these pictures help show the plaintiff as a three-dimensional human being that the jury will want to make whole. Relatedly, if the wrongdoer presented poorly at deposition or if I got some key admissions, I share those deposition clips with the mediator. If a photo is worth a thousand words, a video is worth a million.

I try to get declarations of helpful witnesses for mediation. Some of the most impactful declarations I've used at mediations were from former employees or "me too" witnesses. I typically do not share these declarations with the defense, but I will share them with the mediator and authorize them to discuss them with the defense.

If there are weaknesses in your case that you know the defense will raise, address them. I would just caution you not to include every possible defense, however, because I'm often surprised when defense does not even raise them.

Lastly, give your mediator recent verdicts and settlements of similar cases in your jurisdiction so they can use them to highlight to the defense what they risk if they do not resolve the case.

Share your brief early

I share my brief with opposing counsel well before mediation to give them time to review and discuss it with their client or the insurance carrier. In general, I see little benefit from surprising the defense decisionmakers at the mediation with the information that shows the strengths of my case because by that time, they have already made up their minds about what the case is worth. Sometimes, convincing them to change their minds is not only a psychological challenge, but a logistical nightmare full of bureaucratic red tape. Sharing the mediation brief early gives the decisionmakers the time to consider the arguments and evidence, and hopefully get closer to my valuation of the case.

If there is anything I don't want to share with the defense counsel, I will put it in a separate confidential brief for the mediator's eyes only. For example, consider keeping impeachment evidence confidential and only sharing it with defense at the mediation if you think it's going to make a difference. In a recent case, the defendant testified at deposition that she was not at the location where a key incident transpired. She testified ad nauseam about her clear memory from several years prior of going to a McDonald's on the other side of town on that exact date. Defendant produced a credit card statement showing a McDonald's purchase as further evidence that she couldn't have been there. However, when we investigated, we discovered that the purchase had been posted on the date of the incident, but was for a purchase from the day before. The store code on the credit card statement also showed that it was for a store nowhere near where she testified she had been. While it would have been fun to throw this in her face, it didn't end up being necessary at mediation and it would have packed a much bigger punch at trial. I did share this shoddy McDonald's alibi with the mediator confidentially, however, to highlight just how willing the defendant was to say anything to try to escape the claims.

Have a pre-mediation call

Most mediators will have a pre-mediation call with you. Take advantage of it. Show the mediator that you are serious about the case and start your oral advocacy early. You can also get information from the mediator about where they think the issues are and that can help you prepare for the mediation. A pre-mediation call is also a good opportunity to talk to the mediator about things you may not want to put in your brief such as specific considerations relating to your client or defense counsel.

Win the mediation

Most mediations begin with a discussion about the facts and evidence. This is your chance to give your client their day in court. Your strong advocacy here will empower your client and give them confidence in you as their lawyer. My clients often share with me how validating the mediation was because they finally felt heard and seen.

Next, the mediation will turn to numbers. In negotiating a deal, remain flexible but focused on your objective. Leverage the mediator's insights, but don't feel compelled to accept their recommendations if they don't align with your client's best interests. Include your client in this process—you will empower them and build trust and ultimately have a happier client at the end who feels satisfied with the process, even if no settlement is reached.

At each step, ask your mediator questions. Who is in the other room? Who seems to be the actual decisionmaker? What do you think is the biggest hurdle here? The answers may better inform your negotiations and could be helpful in the litigation if the case does not resolve.

Sign the deal

Once an agreement is reached, it's crucial to ensure that all terms are clearly documented, whether in a long-form settlement agreement or a short-form memorandum of understanding. The agreement should include critical elements such as settlement amount, timing, release of claims, and any other provisions fundamental to the deal. If a lawsuit is filed, include a provision retaining the court's jurisdiction under CCP § 664.6 to enforce the settlement terms if necessary. These days, I insist on a long-form agreement signed at the mediation by all parties so there are no delays, changing of minds, or breakdowns on ancillary terms after the mediation.

Mediation in employment law is an opportunity—not just for resolution, but for justice and validation. By preparing thoroughly, advocating empathetically, and strategically managing the process, attorneys can maximize outcomes for their clients and transform the mediation experience into a powerful step toward healing. ■

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1 According to the Judicial Council of California 2024 Court Statistics Report, approximately 80% of the cases that resolved during the fiscal year 2022-2023, were resolved pre-trial. (Judicial Council of California, 2024 Court Statistics Report: Statewide Caseload Trends, www.courts.ca.gov/12941.htm#id7495, p. 51.) According to the same report, only about 1% of unlimited civil cases proceeded to trial during the fiscal year 2022-2023. (Id., p. 80.)

2 By the time I'm preparing my client for mediation, I have already given them the Mediation Disclosure Notification and Acknowledgement Judicial Council Form ADR-200 that explains confidentiality in the Evidence Code sections 703.5 and 1115 to 1129, and have a signed copy in the file.

POLICY IN ACTION

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Road to Somewhere

HOW CAN ATTORNEYS TAKE STEPS TO IMPROVE SETTLEMENT EFFORTS AND AVOID UNPLEASANT SURPRISES AS THEY MAP OUT A DISPUTE RESOLUTION? ONE LITIGATOR-TURNED-GENERAL COUNSEL-TURNED MEDIATOR (WITH SOME HELP FROM A DISTINGUISHED ROCK STAR) POINTS THE WAY FORWARD.

MARK LEHOCKY

IN HIS BROADWAY SHOW *American Utopia*—a joyous mix of music, dance and social commentary—David Byrne reprises his classic Talking Heads song "Once in a Lifetime." Along with the lyrics "How do I work this?", "Where is my large automobile?" and "This is not my beautiful house!" are the stirring refrains:

Well, how did I get here?
My God, what have I done?

These questions reverberate as I read mediation briefs in many cases in which the disputants close in on a trial or arbitration date with strong convictions that, sadly, don't mirror reality. "Reality" here means the probability of winning juxtaposed against the cost of disputing fully—litigation costs, diversion of time and resources and other effects on organizations and people.

Mediators who do their job well carefully posit how things may play out—the good, the bad and the ugly—along with their associated costs. But even delivered delicately, that analysis can trigger awkward conversations among clients and counsel as to how an early case diagnosis has changed markedly, and why it took so long. This is often not pretty.

Based on my decades as a litigator, general counsel, client and neutral, let me share some tested steps to reduce one's need to answer David Byrne's famous questions and suffer the resulting harm to client and counsel relationships.

Conduct a *pre*mortem. In *Beyond Right and Wrong*, his groundbreaking work analyzing handicapping errors by counsel and their causes, Randall Kiser explores various ways to contain unwarranted overconfidence. One strategy is to conduct a "premortem" early in the life of a dispute: *If we look back 12 to 24 months from now and things have gone sideways, how might that have happened? What can we do now to minimize that risk, or at least better measure it?*

A disciplined review of where things might go wrong requires a hard look at all material assumptions and means to test them: *What are we missing?* It's always better to kick the tires hard at the outset—and to keep kicking them. Which leads us to Step Two.

Talk early and often about the merits. The ease and efficiency of email and other forms of electronic communication is undeniable, yet they come with a cost. Emails and letters between adversaries rarely prompt frank exchanges. Instead, as essentially permanent records of communication, they typically resemble advocacy missives devoid of candor.

Yet the earlier that opponents meaningfully discuss the substance of a case—via phone or in person—the earlier the parties can come to an unvarnished view of the pluses, minuses and alternatives: repaired relationships, reinstated employees, reworked contracts and more. Saving those deeper dives until a later mediation can lead to troublesome days of reckoning, especially as many alternatives evaporate over time. Which leads to Step Three.

ISTOCK/JANIECBROS

Don't immediately default to mediation. The growing use of mediation to speed dispute resolution has been a godsend for clients, saving them time and resources, and preserving future opportunities. But mediation shouldn't come first or supplant direct discussions. Indeed, direct dialogue often exposes the source of the misunderstanding of facts, positions and objectives. As such, it produces a closer approximation of reality and reveals productive paths to explore.

Of course, sometimes direct efforts don't do the trick, and a facilitated negotiation (a fancy way to say "mediation") is needed. But the preceding direct dialogue should significantly pare down the number of misunderstandings before mediation takes place.

Testing this approach at my prior companies, we adopted a "three-conversation" rule: Before any mediation took place, our inside or outside counsel were asked to have three substantive conversations with adversary counsel. Why three? Typically, the first call caught the other side off-guard. But by the second or third chat, a meaningful exchange would usually take place. We learned. They learned. Everyone could better assess, recalibrate and avoid unpleasant surprises down the road.

For direct exchanges to really be effective, by the way, they must be *real* exchanges. Playing hide-the-ball while asking for candid input from the other side doesn't work. Nor should it. When conducted with candor, though, these exchanges often clear a path to resolution—sometimes with the aid of a mediator, sometimes not. But if mediation is inevitable, let's move to Step Four.

Share your mediation briefs, and do so early. While some attorneys avoid sharing these briefs, think about the consequences of not doing so. Without the benefit of the other side's best elucidation of their position, your side sees only the most positive spin on your story. Rose-colored glasses become rosier, positions harden and resetting expectations becomes more difficult. Conversely, sharing briefs allows everyone to assess realistic potential outcomes in advance, adding needed perspective to the mediation dialogue to follow.

Adjusting to adverse information also requires time, particularly when multiple constituents—business partners, insurers, family members—are involved. More than one "leveling" conversation is often needed. Sharing briefs early allows for this needed recalibration, thereby enabling the parties to avoid Byrne's second question: *My God, what have I done?*

Implementing these recommended steps and doing so early in the life of all disputes regularly pays dividends, saving time and resources—and sometimes people and relationships, too. With all due respect to the great former Talking Heads front man, there's no reason for a dispute assessment and settlement effort to be *same as it ever was, same as it ever was.* ●

"Direct dialogue often exposes the source of the misunderstanding of facts, positions and objectives."

INSIGHT

Mark LeHocky
JUDICATE WEST

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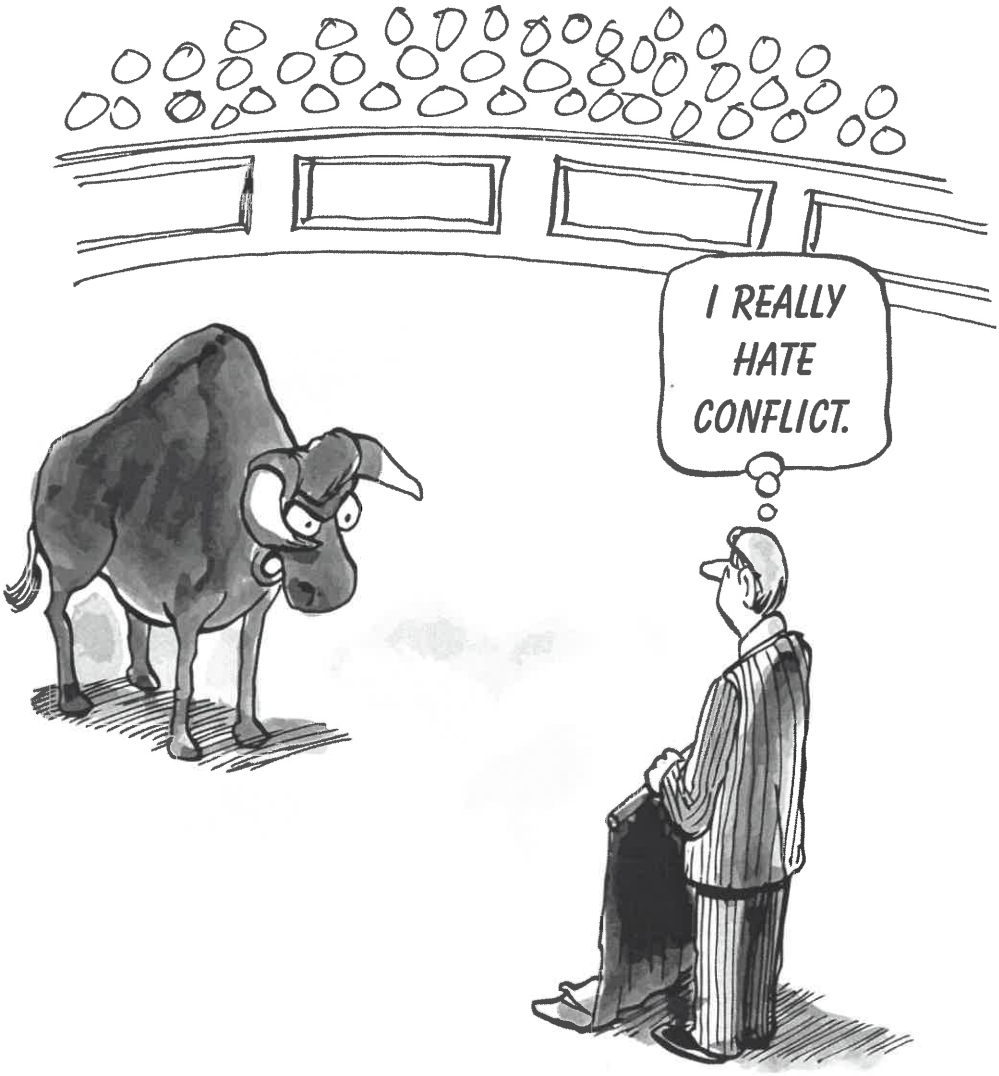

Rethinking mediation with behavioral-science data

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.