Overcoming Mediation Anxiety: *Lawsuits by their nature produce anxiety for both clients and counsel. Here's some practical advice to get the client—and yourself—on board.*

By Mark LeHocky | May 24, 2016 | California Lawyer Magazine

The typical client scenario revolves around the belief that the other side has done something wrong: they have taken an adverse employment action, infringed a patent, breached a contract or failed to live up to one—and the angst of having been done wrong takes over. Institutionally as well as individually, once that feeling takes hold, it has serious ripple effects. Take this last point as Gospel from a litigator turned general counsel turned mediator: companies often experience their own form of lawsuit anxiety that triggers all sorts of non-productive behavior—actions that are bad for business, bad for focus and often bad for everyone involved in the dispute.

For counsel advocating the client's position, the anxiety is different but no less pervasive. Client expectations tend to run high—often unrealistically so—and while victory has its rewards, bad results can threaten client relationships, imperil the prospect of getting paid, damage a lawyer's reputation, and much, much more.

Add to all of this anguish the strange world that is mediation: a process to end disputes that depends entirely upon reaching consensus with the enemy. To no surprise, the mediation process adds its own layers of anxiety—starting with the notion that you need to reach an accord with the same folks you think caused the problem in the first place.

The premise of this article—and two to follow—is that "mediation anxiety" has produced myths and misunderstandings about what mediation can and can't do, about the tradeoffs of mediating versus litigating, and the merits of mediating early versus late. In turn, the article suggests a path for navigating through the mediation process effectively. And even if the journey can't be entirely anxiety-free, at least the parties (and their lawyers) can focus on what truly matters.

Take Stock of the Situation

As a first step toward overcoming the myths and anxiety surrounding mediation is to reflect on a simple inquiry: how did we get here? Many of us who have been practicing for several decades can recall the days when mediation was largely unknown—a discipline that was practiced rarely and often confused with yoga, Eastern philosophies, and sitting on the floor without proper back support.

Back then, very few lawyers used mediation to resolve lawsuits. Instead, we were routinely ordered down the hall by the assigned judge to meet with another judge who held a mandatory settlement conference (referred to in the vernacular as an MSC) on the eve of trial. All discovery and pre-trial work was done, and the MSC would frequently become a marathon endeavor, punctuated by the lack of food and bathroom breaks, not to mention the pressure of an impending trial date and the consternation of the MSC judge. Eventually, the rusty gears of this inefficient process produced a settlement—often with grumbling all around.

So then what happened? This process slowly moved from the courthouse to an office building. As private mediation began to grow, many of its pioneers were themselves retired judges, and through their (and counsel's) familiarity with late-stage MSCs, the private mediation model developed with an obvious sameness: more late-stage marathon sessions, typically close to trial, often preceded by little or no direct settlement discussion between the parties.

With some notable exceptions (such as the Northern District of California's early stage ADR program), that MSC-based private mediation model continues today. But it doesn't persist because it is required to do so. Rather, counsel and client default to late-stage mediation efforts because it's what they grew up with; they either believe that an early mediation can't work, or else they have chosen to avoid the mediation conversation itself, because…well…it can be hard.

Given this background, it's no surprise that a lot of folks just don't appreciate what mediation can accomplish, and they sure don't appreciate the money it can save. Indeed, many of the enduring misconceptions about mediation cannot withstand a simple cross-examination, much less a thoughtful and thorough discussion of tradeoffs, alternatives, risks and rewards.

So why doesn't that conversation take place, early on and always? I would suggest it is because anxiety has once again reared its ugly head.

Three Stages of Effective Mediation Advocacy

As part of my course on Mediation Advocacy at the UC Davis School of Law, we focus on the skills needed to best represent clients in mediation. I describe three stages of effective mediation advocacy:

- explaining and engaging the client on the topic;
- engaging the adversary prior to the actual mediation; and
- advocacy at the mediation itself.

For many practitioners, woefully little thought is given, or effort expended, on the first and second stages. Yet they routinely prove to be the key to client satisfaction *and* to achieving the most reasonable outcome in a contested matter.

The initial counsel-client mediation conversation is perhaps the most critical to reducing client anxiety early on and building the rapport needed later to create buy-in around a mediated outcome. *Why?* Because clients often have high expectations about their prospects in the litigation—statistically proven to be higher than reason dictates in most instances. See Donna Shestowksy, *Mediation? Negotiation? Arbitration? Trial: A Multi-Court Study of Litigants' Preferences* (ABA Dispute Resolution Magazine, Summer 2015) at pp. 28-32.

Faced with such over-optimism, some lawyers fear an adverse reaction when they first broach the subject of mediation. After all, mediation presents the looming specter of potential compromise with a dreaded adversary. The fear of client reaction—make that *negative reaction*—is palpable. Can't you just hear the client complain: *What? Have you lost faith in our position? I hired you because you thought we had a strong case, and now you are suggesting we back down?*

Lower the Temperature

It doesn't have to be that way. Here are a few steps to de-stress the situation and establish needed client buy-in:

- *First*, explain the benefits of mediating even if the case will not fully settle right away. Too often, counsel and clients view a mediation as either a complete success or an entire failure. If we settled, great. If we didn't, we failed; and what a waste of time that was! This view overlooks the many strategic benefits of mediating, especially early on, including:
    - Eliminating some of the factual issues in dispute.
    - Narrowing the scope of the dispute to be litigated if a full settlement isn't feasible at this preliminary stage.
    - Understanding core objectives and priorities all around. The sticking points may be different and more manageable than you think. As well, the other side may be misreading your position as to items that are negotiable and those that are not.
    - Sharing information that may cause the other side to change their settlement position (or in some cases *your* position).
    - Exploring alternatives for settlement that a court may not order regardless of who wins, and that may not be available later.
- *Second*, raise the mediation topic with your client at the *outset* of the relationship:

- Explain its strategic importance for all the reasons described above. Rather than viewing mediation as a "white flag" exercise, come to see it as a process rich with potential to significantly narrow, if not immediately resolve, the entire dispute.
- Explain that mediation represents a parallel path to explore resolution, rather than an "either/or" to a traditional litigation path. You don't have to pick between them, although how you approach them differs.
- Reinforce that the process is entirely *voluntary*. It bears emphasis at every state of mediation that the client continues to control its own fate, rather than having a court or jury do so.
- Ideally, explain that it is your regular practice to use mediation early on for all of these reasons, rather than a "one off" suggestion for this particular case.

Keep in mind that deferring the mediation discussion has its own perils. Can't you just hear the later retort: *If this is such a good idea, why didn't we discuss it earlier—when other options were open, and before both sides incurred all this expense?*

In fact, a key benefit of early mediation is that it gives clients more control over balancing legal costs against potential settlement options. Doing so should in turn produce a residual benefit to counsel-client relationships. If the client proceeds with a mediation and rejects the settlement proposal in favor of its day in court, the client has made that choice, and regardless of the outcome, there should be less reason to complain when the bill arrives or the verdict disappoints.

Speaking of mediation and client relationships, here's another thought about the perceived tension between client economics and law firm economics. While a settlement ends a lawsuit and the legal spending it generates, high quality work is always needed to maximize the mediated outcome. Indeed, lawyer concerns about the economic impact of promoting mediation often misses this reality: optimal mediated outcomes routinely flow from the work of the best-prepared counsel and clients. The converse is also true. Lack of adequate preparation and presentation often impedes, or at least discounts, reasonable settlements.

Valuable and value-added pre-mediation work is multi-faceted. Some of it will occur via formal discovery, but much may also occur through direct engagement with the other side, and even more through fully exploring your own client's resources. It all takes time and effort, as does adequately educating your mediator and advocating through that process. It may well require more than one mediation session for more complicated matters. But a properly executed mediation strategy minimizes

complaints when the bill arrives and greatly increases the prospects for future business.

As someone who both paid the bills and worked with many firms, I bear testament to a direct correlation between the active and early use of mediation and the generation of long-term client-counsel relationships.

Getting to Okay

Assuming you raise all these points in an early discussion about mediation, what's the likely reaction? More anxiety-driven retorts may indeed follow, again tied to misapprehension about the process, alternatives and the people on the other side. But chin up; you will get through it. Consider the following common reactions and concerns, as well as these further responses to lessen the anxiety and achieve buy-in for mediating, preferably sooner versus later:

- *Have you lost faith in our case?* No, but it will help us to learn why the other side sees things differently. If we can sort out misperceptions on all sides, we reduce everyone's sunk costs, which otherwise can be a significant counterweight to a later settlement. Moreover, despite our best efforts so far, if we discover something both material and bad through an early mediation, it's much better to know that now rather than later.
- *Isn't it too early? Don't we need all the discovery first?* Probably not. We can likely build an acceptable proxy for what we can obtain through formal discovery from our own investigation, some voluntary exchanges with the other side, and making reasonable assumptions about what the other side will say or the evidence will reveal. Formal discovery is typically very inefficient (read: expensive), disruptive and often breeds satellite disputes that distract everyone from the core issues in dispute. Conversely, using the mediation process to generate "free discovery" is a good thing, particularly when we take steps to make it reciprocal.
- *Don't we need to save our "smoking guns" for trial?* Why? First, what is the proverbial "smoking gun" here? Is it really a secret? Even if so, won't it be discovered anyway, and what can the other side really to do to avoid or discount the smoking gun? Most importantly, let's balance the pros and cons of sharing the most compelling evidence now. If it is likely to reset expectations, we should be using it now to prompt a resolution now.
- *Doesn't the suggestion of mediation also signal weakness to the other side?* Not at all, providing we do it right. If we are confident in our position and we share our reasoning, mediating early is a great opportunity to educate the other side and reset their expectations. Further, suggesting mediation early on

does not convey weakness if it is what you regularly do to properly "scale" any dispute. We can explain to the mediator not only our legal position but also why we recommend mediation now, and if the other side nonetheless misreads our position and intentions at the mediation, we can always vote with our feet. Little ventured and much to be gained.

- *Don't we have an important precedent to protect or establish here? If we compromise in this case, don't we open the floodgates to other objectionable claims?* First, let's dive deeply into the perceived precedent: Is this really a key issue and one likely to recur? Or is it really a "one off" matter, like most disputes? As to the "floodgates" concern, there is no empirical evidence to support the notion that cases settled for minor payments or minor concessions indeed trigger any torrent of similar cases of similar value. By contrast, adverse judgments or jury awards are much more likely to draw attention and similar "me too" claims. Finally, the notion that battling to and through a court "victory" will deter meritorious claims or defenses from being pursued or defended also lacks empirical support. If anything, common sense dictates that good claims will attract good and persistent counsel regardless of how prior claims are battled. Better to tackle these disputes individually than to pursue Pyrrhic victories.
- *Don't we only get one shot at this (and accordingly shouldn't we mediate later)?* Not at all. Despite mediation's odd mutation from the mandatory settlement conference model, mediations can be phased. We—and our opponents too—may well learn things at the mediation that warrant a break in the action and a resumption later after some additional homework. While those same discoveries and gaps will likely surface anyway in the ordinary course of formal discovery, tackling them through early mediation allows everyone to sort through these items more efficiently. Further, the mediator can help everyone define and narrow the core discovery issues and set the stage for the next conversation. Progress will come in stages, not all at once.
- *Aren't mediations expensive?* Actually no, when compared to the full cost of a traditional litigation path, including direct out of pocket costs, indirect costs to individuals as well as businesses, modified behavior, not to mention losing the focus of opportunities while the litigation festers. Qualified mediators are not cheap, and this is not an area to cut corners. But keep in mind that even if the dispute does not fully resolve at the first mediation session, the preparation work is usually recyclable. Further, the amount of confusion and fog eliminated will likely reduce the scale of the overall dispute even if the case
- does not fully resolve right away.

A final word about overcoming mediation anxiety and preparing clients: Mediation should never be considered a substitute for direct dialogue with the other side. Rather, as we will explore more in the next installment, early, active and ongoing dialogue enables the most productive mediation to follow, by reducing the number of surprises and starting the process of resetting expectations where needed *on both sides* of the table.

Next time: Engaging the other side to maximize the mediation opportunity for all concerned.

Mark LeHocky is a former litigator specializing in complex business disputes, the former general counsel to two public companies, and a full-time mediator and arbitrator affiliated with ADR Services, Inc. He has repeatedly been voted a *Best Lawyer in America for Mediation* for successive years by Best Lawyers®, has taught Mediation Advocacy at the University of California, Davis' School of Law, and today teaches at UC Berkeley's Haas Graduate School of Business on the intersection of law, risk assessment and business decision-making. See www.marklehocky.com