

Why GCs Should Pursue Mediation First, Not as a Last Resort

By TYLER MEADE AND TOM WIEGAND



When businesspeople have a conflict, and cannot resolve it with their counterparts, positions can quickly calcify. Lawyers are added, and soon the parties are enmeshed in expensive and unpredictable litigation. To what end? The odds that one side or the other will be vindicated at trial are minuscule because almost all of business disputes eventually settle. Pursue [mediation](#) first. Spend a few days and a modest amount on a mediator trained in breaking

impasse. There are many misguided reasons companies fail to do this.

In-house counsel straddle a difficult line. They are responsible for protecting their company's contractual and other rights. On the other hand, they are acutely aware of the high cost of litigation, and do not enjoy having to explain themselves when the legal team blows through its budget. Even so, counseling against prompt enforcement of a company right is distasteful to most general counsels. The path to

litigation is thus well-trodden.

The incremental short-term decisions are easy to understand. The cost of factual and legal analysis in drafting a complaint can be seen as a necessary cost of understanding the problem. Then armed with this knowledge, the "go/no go" decision of whether to file a lawsuit requires little immediate additional funds – indeed there often is a lull in legal expenses after a complaint is filed. And for those times when one party pauses to consider whether the

expense of litigation is worth it, they can be dragged into litigation if the other side files.

Before long, the post-filing lull ends. [Discovery](#) and motion practice ensue in the pursuit of not only better understanding facts and legal claims, but in competing with the other side to gain an upper hand. A staggering amount of work is done, at great expense, and yet businesspeople seeking vindication at a trial are likely to be disappointed.

Engage a neutral mediator to help find a solution at the beginning, shortly after lawyers are first contacted.

Lawsuits, especially over business disputes, almost always settle. Statistics published by the federal courts and in law journals show that less than 1% of cases reach trial. And when a trial does occur, half of the parties lose, and the winner often walks away with a more modest verdict than was imagined. Was the cost and the attendant delay worth it?

THINK ABOUT MEDIATION SOONER RATHER THAN LATER

There is a better way. Engage a neutral mediator to help find a solution at the beginning, shortly after lawyers are first contacted. This path is not pursued for a host of justifications that often fail when you look under the hood:

- **“We need to litigate to get needed information”** — No. Sometimes

facts are needed, but discovery is usually slow and too comprehensive. Mediators can be much more effective in obtaining early information exchanges, while avoiding the vast majority of deposition testimony, written discovery, and documents that end up on the cutting room floor. It is not unusual for the authors to persuade a party to share information in mediation that they initially refused to produce in discovery.

- **“We need to litigate to hone legal theories”** — No. If a specific legal issue truly is unknown, a former judge or professor can be jointly retained in a variety of ways. And while that is not determinative of the trial judge’s opinion on a novel issue, nor is the trial judge’s opinion predictive of the appellate court.
- **“We need to litigate to learn what the case is worth”** — No. Whether parties evaluate claims in mediation or litigation, much of the early-stage uncertainty remains on the eve of trial – the conclusions of juries, and trial and appellate courts, are not easily predicted.
- **“We look weak if we are willing to mediate”** — No. Being willing to talk shows confidence and strength, not weakness. It also provides the chance to show that your assessment is far more accurate. Meanwhile an unwillingness to listen often means fear of what might be learned.
- **“The other party is being unreasonable”** — So? The litigation process rarely causes unreasonable parties to find reason, and even drives them further afield as they filter developments through



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partisan glasses. Breaking through this affliction is what mediators do, regardless of timing.

- **“If we don’t settle now, we can always settle later.”** Maybe — but at far greater expense. And maybe not — because circumstances change. To the extent a line of business can be salvaged, or a patent licensed, that is much more likely when the problem first arises. That line of business or patent may be worthless in a few years.

The cost of mediating is small, especially compared to the potential upside of avoiding the costs of litigation, and you are going to wind up doing it later anyway. Pursue mediation first; it’s a seriously good idea.



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