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## Real-world mediation advice from general counsel

General counsel bring unique insight to mediations based on what they've seen work—and fail. Recognizing what in-house counsel believe is effective and what they're uniquely positioned to contribute separates successful settlements from negotiations that collapse.

By David R. Shraga

On the first day of law school, in a class unremarkably titled “Legal Writing,” rookie lawyers learn to ask perhaps the most critical question they will continuously consider throughout their careers: “Who is the audience?”

The point is simple—we must understand who we are talking to and their role in any process to communicate with them effectively. Whether evaluating, advocating or collaborating, a custom crafted approach for your audience is essential.

And it turns out that during mediations this foundational principle has a unique application. All parties to a settlement are created equal, of course. In a mediation, however, one participant is particularly important to understand—the in-house counsel there on behalf of a corporate party.

Having observed and listened to many General Counsels (GCs) and having been a litigator and an in-house lawyer myself, I've seen again and again how they can be our best teachers. Recognizing what the GCs and their deputies believe is effective and what they are uniquely positioned to contribute can be the key to a mediation going off the rails or ending successfully.

As outside counsel attending the mediation with your client, or as the mediator on the case, you can find value in the following lessons learned from exceptional GCs at leading companies.

### GCs allow space for empathy in candid settlement talks

*The GC of a software giant showed up at a mediation with a plaintiff that had once been a valued business partner. “I want them to know we appreciated their contributions to our growth, we're sorry the relationship ended badly and that I'm here to help resolve this,” she explained.*

Many plaintiffs, even in business cases, benefit from dialogue and acknowledgement. If those intangibles can be provided at mediation from an engaged GC it can satisfy that need to have their day in court. That's why this GC embraces the (sometimes unpopular) joint session to connect directly without posturing. “If I can soften the company's voice,” she explained, “it paves the path to resolution.”

While her words sent an important message, her opening offer did the real talking. The plaintiff had come in unreasonably high, but this GC didn't play games. So rather than respond in kind and unreasonably low, she made a fair opening offer. She wasn't there for arbitrary horse trading. She was there to be serious, to offer realistic numbers for the case and to make reasoned moves.

Being offered empathy, a listening ear and respectful terms has value and helps both sides compromise. Beating up the parties is not what persuades them. Instead, GCs pivot based on objective reasoning, compelling substance and new considerations they can take up the chain (while still not confusing empathy with concession).

Why extend herself like this and lead with vulnerability? Because this GC knew wins don't just happen in court. Competence and credibility lead to reasonable settlements, which eliminate uncertainty, make sense for a corporate party and are another form of winning.

### The GC is a window into the company's values

*The Chief Legal Officer for an entrepreneur's diversified family office, which also owned public sports venues, had been turned off right away. The mediator started the day as many do-by jumping right into trading numbers. But for the GC, much more was at stake.*

In-house counsel represents a business with core values, a philosophy of who they are and a valuable reputation. Before talking about the dollars, a sophisticated GC wants to know you understand what matters to them. So, let them educate you about their company's values, how they feel about the dispute and how these considerations affect their settlement posture. Slow down, listen first, and then keep it going in your sidebars. Talking about dollars without letting them share these insights is often premature.

For example, in this slip and fall at a venue, before she was ready to start swapping offers, the GC wanted to first let the mediator know the company takes its safety obligations seriously, cares about the fans and—given the volume of visitors and their deep pockets—can't be regarded as an easy target.

What's more, the GC may want the mediator to appreciate (and tell the other side) that the owners are philanthropists who don't pay cost-of-defense settlements at the expense of an important principle and think longer term about deploying their dollars for good.

Skipping this dialogue can alienate a GC who is committed to protecting these values. By contrast, a mediator who listens to the GC and understands her stakeholders is doing important work to build rapport and trust, clarify the interests behind the positions, and then foster resolution.

### GCs expect you to understand their “what” and their “why”...

*The Fortune 100 company's Chief Counsel arrived at the mediation with his two most important questions in mind. “What is our what?” and “What is our why?” In other words, have we thought about what we want and have we defined why we want it?*

In-house lawyers do extensive work before a mediation ever starts to answer these questions. And when the answers are not immediately clear, they ask a more foundational question - are we ready for this?

Without a “what” and a “why,” mediations can devolve into an informal, amorphous adjunct to the litigation process. However, sophisticated in-house counsel, guided by their “what” and “why,” use the process to explore “mini-versions” of the potential outcomes they might obtain or face. And while GCs don't expect a mediator to “win” for them,

a mediator must understand and validate the GCs' "what" and "why" to gain their confidence. Equally important, the mediator must uncover the other side's "what" and "why," so the GC can also learn what is motivating the other room.

GCs navigating complex disputes want more than a mechanical, tit for tat, you give up something and I give up something, zero-sum game approach. Instead, unpack and solve for the "what" and the "why" to position a mediation for success—as the GCs define it.

### **The GC is an unsung expert**

*The GC at a technology company lamented how even very capable lawyers and mediators can fail to take advantage of a readily available resource at the mediation—the GC who is sitting beside them with more to offer than just a checkbook.*

Not all disputes are created equal for a GC. For example, if a dispute strikes at the core of the business and involves critical intellectual property, in-house counsel comes with deep interest in the matter. More routine money disputes, by contrast, will not involve the same considerations.

GCs know a key function of their role is to evaluate claims and make these determinations, and they identify priorities based on their insider's knowledge of the company. That's why the in-house lawyers are the true experts in the room. Experts in their client's culture and business, in their broader industry, in the subject of the dispute and in the potential pathways to resolution.

Highly effective mediators and outside counsel recognize this expertise and make the most of it during their caucuses. Breakthroughs come from listening to the GC ex-

press the company's perspective, articulate its interests and explain its objectives. Internalizing their unique operational insight, first, and then helping them test their beliefs about the case, second, creates a process that has value – even if the case does not settle.

### **In closing**

These examples illustrate the sophisticated, nuanced and dynamic world of in-house lawyers. They advise global leaders, manage teams larger than many law firms, oversee diverse issues and mentor the next generation of leaders. In truth, their legal judgment, business fluency and emotional intelligence makes them much more than an audience to consider. It explains why in-house counsel so often become the quiet architects of successful settlements.

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