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# A Once In a Lawsuit Opportunity

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I participated in many mediations and settlement conferences before I became a [JAMS](#) neutral in 2019. And I worked for some talented in-house counsel who knew how to settle and, importantly, *whether* to settle. Based on what I learned from my clients as their trial counsel and from hundreds of [JAMS mediations](#), here are four mediation suggestions that in-house counsel may want to consider.

## 1. Attend.

**(a) You'll help.** In-house counsel improve mediations. In the presence of the other side, I'll ask how far they've traveled to be here or where they're Zooming from. Their presence alone puts extra knots of windspeed in my sails because it sends a positive message: This mediation is important, so we sent someone important. Your attendance shows respect for the process and the parties. And if your opponent is (or may one day be) one of your company's vendors or customers, that message is even more important.

**(b) You'll learn.** In-house counsel sometimes learn things during mediations that change their view of the case or provide valuable information about their company. I've heard in-house lawyers exclaim, "We do what?!" upon learning of ill-advised activities going on inside their organization.

It's good to see your trial counsel present your company's case. Make sure they're not advancing positions inconsistent with positions the company is taking elsewhere. It's also good to see the performance of the mediator your counsel has chosen.

And if you're going to ask your general counsel or CEO to consider a sudden or radical change in settlement strategy or terms, you're likely going to want to base that request on firsthand knowledge you gained when you rolled up your sleeves and got into the trenches.



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**(c) You'll improve yourself and others.** If you go to mediations regularly, you'll be better prepared to help your trial counsel identify mediators who have history with the subject matter, special skills or necessary technical knowledge. With the rise of virtual mediations, you can recommend mediators who are based almost anywhere.

You know things about your organization that trial counsel doesn't. Is there value in paying or accepting a settlement in Q3 rather than Q2? Is there non-cash consideration that matters more than money? Are there implications to settlement beyond the resolution of this suit? Unexpected opportunities often arise in mediation that in-house counsel is best suited to recognize and evaluate.

## 2. Prepare.

Chicago sportswriter Hugh Keogh once said, "The race is not always to the swift, nor the battle to the strong, but that is the best way to bet."

Almost all cases settle, so why are you preparing for a trial that will almost certainly never happen instead of a mediation that almost certainly will? Savvy trial teams prepare more for mediation than they do for trial. Do you really want to save certain facts or arguments for trial, or would you rather introduce them at the mediation? Do you want to have the other side incur significant expert costs before or after the mediation? There are important strategic decisions that you want to help make long before the mediation.

You spend time with your counsel before trial, so spend time with them before mediation. Make sure they have the case at their fingertips and their arguments sharpened to a fine edge. Challenge their strategies and theories. Should we schedule the mediation after the court rules on dispositive motions or while they're pending? Outside counsel will benefit from your institutional knowledge.

### **3. A mediation is a unique opportunity. Don't squander it.**

A mediation is not just a day of facilitated negotiation. It's much more than that.

Everyone has blocked out a full day, reviewed files, vetted and refined arguments, debriefed experts, hand-capped trial and mediation outcomes, and secured authority and buy-in. The parties are ready, willing and able to settle, and hopeful that this will be the last day of a long, stressful and expensive lawsuit. An experienced mediator is prepared and primed to help the parties reach an accord. You typically get only one mediation in the life of a multi-year lawsuit, and this is it. This case will almost certainly settle before trial, and today may be your best chance to secure your best settlement.

### **4. Use your status.**

In-house counsel hold sway with mediators.

There may be messages you want the mediator to carry into the other room. ("The G.C. tells me she's not here because she's afraid of this case; she's here because she's tired of it and wants to either settle or throttle up immediately for trial.") Tell them to do it. They will.

Remember, mediations are a negotiation for the purchase and sale of the plaintiff's claim—an intangible

asset of unknown, highly speculative and wildly contested value. As a mediator, I'm less interested in what the case is worth than I am in what the parties think it's worth. I use suggestions, brackets and mediator's proposals to try to find a number that both parties can just barely accept. In-house counsel have the gravitas to help persuade me that the other side may have to move a bit farther than they will to reach that number. Trust me: Mediators notice when in-house counsel's message goes from "That's all the authority I have" to "That's all the authority *you* have."

Experienced in-house counsel have an important backup objective at mediations, one that trial counsel don't have. If the case doesn't settle, it is to your great advantage to leave with the clearest possible understanding of what you would have to take or pay to settle on the day of mediation. It is not an exaggeration to say that every important decision you will be called on to make for the rest of the litigation will benefit from that knowledge.

In-house counsel, trial counsel and mediators will all benefit when in-house counsel participate in mediations. This is why in-house counsel should consider preparing for, attending, leading, managing and maximizing this unique Once In A Lawsuit Opportunity™.

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