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# The Operational GC: When Negative Situations Arise, Use a Neutral Positively

**Litigation and Dispute Resolution**

While you might excel at preventing future disputes that could cost the company money and distract employees, companies have yet to equip in-house attorneys with a time machine to change the past. Inevitably, conflicts arise from prior agreements and relationships.

As in-house attorneys, these conflicts force us to pivot our focus from business building to business defense and perhaps legal offense.

Sometimes you will have the opportunity to initially route these conflicts away from the courtroom into a consensual dispute resolution process, such as mediation. Indeed, many contracts contain provisions for negotiation and mediation to occur before litigation or arbitration is filed. And many courts request that the parties attempt mediation before a judge or jury is asked to hear a dispute.

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How should you prepare for mediation? It is not a strictly adversarial proceeding akin to a court hearing, however it is not likely going to be a collaborative lovefest either. The goal of this article is to tell you how to get ready.

## What’s the problem?

Not all alleged problems are appropriate for mediation. You need to assess the factors that created the dispute in the first instance.

If you can address the root cause in a manner so that it does not arise again, then the matter may be appropriate for mediation. For example, if there is a dispute about an employment agreement, you

could modify your form of agreement for other employees and contractors in the future.

By contrast, if the counterparty has an objection to a core business method used by your organization that cannot be easily changed, then mediation of one person's dispute will not stanch the flow of subsequent claimants with similar issues.

## Start the learning loop

In order to properly protect your company, you need to put yourself into the shoes of the opposing claimant and assess:

- What could you change about your company and its practices in the future that would eliminate this type of claim from recurring?
- Are others likely to have similar concerns?
- Is there another approach that your company could take?

A dispute can present an opportunity to drive internal changes in your organization to mitigate future risks.

Your business colleagues are likely to abhor the numerous evidence-gathering requests tied to preparation for the court or mediation. If you tell them there could be many more such fact-finding tasks in the future, they may suddenly be more open to changing some practices that could forestall future disputes.

## When to seek mediation

When deciding on the appropriateness of mediation, consider whether an important precedent needs to be set. For example, do you want an official tribunal to publicly approve one of your practices? Mediations are private and the results are typically confidential. They do not provide useful precedents. However, if you don't have the perfect fact pattern to tee up the matter for a tribunal, then mediation may still be appropriate for this matter — while you wait for a more appropriate test case.

Do you want to send a message to a particular constituency or the broader public about your company not being an easy target for certain types of claims? If so, a public fight may be more appropriate because it showcases your company's resolve.

## Choosing your mediator

Before you need to select a mediator, you will likely have interacted multiple times with opposing counsel. Consider the extent to which opposing counsel is realistic about the facts and the law.

If your opposing counsel remains wildly optimistic or aggressive without any apparent legal or factual basis for such a posture, you should be focused on finding a former jurist as your mediator. Someone with extensive expertise on the bench has a better shot at injecting realism into the view of each party and their counsel based on their firsthand experiences.

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If your own client does not appreciate the cost and effort involved in litigation, which can last for years, having a former jurist serve as a mediator can provide an independent sounding board to your client about the costs of the road ahead if the matter does not settle.

Remember that the mere fact that a mediator is a former jurist does not unequivocally qualify them to serve as *your* mediator. Determine the extent to which they previously heard cases of similar nature as your dispute. And find out how many matters they have mediated and what percentage reached a settlement. Call independent references to ask about their experience with the mediator.

## Briefing

Set up a call with the mediator in advance about your party's perspective on the matter. While the mediator is a neutral, it is their job to convince both sides to find a common zone of agreement. By sharing the facts and law that you consider to be relevant with the mediator in advance, they are better armed to try to persuade the other side that they may have some weaknesses and should be reasonable.

To best arm the mediator, also prepare and submit a mediation brief for reference throughout the discussions. Think of the mediation brief as the same type of document you would submit to a court for full adjudication of the matter based on the documents. The brief should contain and refer to exhibits supporting all your factual assertions.

If testimony of one of your clients is crucial evidence, prepare an affidavit signed by the client to turn that testimony into written evidence as well. If you are citing cases as your source of law, do the research to ensure they have not been superseded.

> A solidly researched and documented brief can give you significant power in the mediation because it enables the mediator to speak with conviction about the strength of your case if the matter proceeds to trial.

In addition to arming the mediator, preparing your mediation brief will put you in good stead to credibly argue that you are ready to take the matter to a court or arbitrator if it is not resolved in the mediation. Assembling the evidence to accompany the brief will start training your client about what types of information need to be preserved and produced to support your case.

After experiencing the work disruption that ensues from diverting multiple days to gathering evidence, your client's perspective on the virtues of a rapid settlement may change significantly.

A solidly researched and documented brief can give you significant power in the mediation because it enables the mediator to speak with conviction about the strength of your case if the matter proceeds to trial. If your counterparty is looking for a quick payout, it's less likely they will have engaged in substantial research to undercut your perspective.

## Dry run

Treat the mediation preparation as an opportunity for a dry run of your litigation strategy. Gathering evidence is a way to test whether your recordkeeping and preservation systems are working properly.

If outside counsel is involved, this represents an opportunity to review their work product and approach before it goes before a sitting judge or arbitrator.

If you have an experienced jurist, or even perhaps an experienced litigator as your mediator, then you have a relatively low cost opportunity for feedback on your position and how it interplays with arguments of the other side. If mediation fails, you will still be better suited for trial if the feedback from the mediator better hones your arguments or identifies blind spots in your evidence gathering.

## Expected case value

A mediation can also benefit you by forcing your clients to put a more realistic value on the matter, which can benefit reaching a settlement. In your private sessions with the mediator, talk about the probable outcomes for each issue in dispute: What is the likely dollar value and the likelihood of prevailing?

A US$200,000 issue with only a 20 percent chance of prevailing would be worth US$40,000 using such a methodology. However, this value calculation requires many further adjustments. If there is no fee-shifting provision, then attorney fees need to be subtracted from the total. And the opportunity cost of distracted employees gathering evidence and preparing for depositions needs to be subtracted from the cost.

> When working with your business colleagues to assess the value of your case, don’t forget about the value of keeping a particular matter private.

Odds are high that if you ask a senior executive what his or her time is worth to the company, you will be told a high hourly rate. After subtracting all these costs from the expected value of US$40,000, your colleagues may be less excited to litigate the matter.

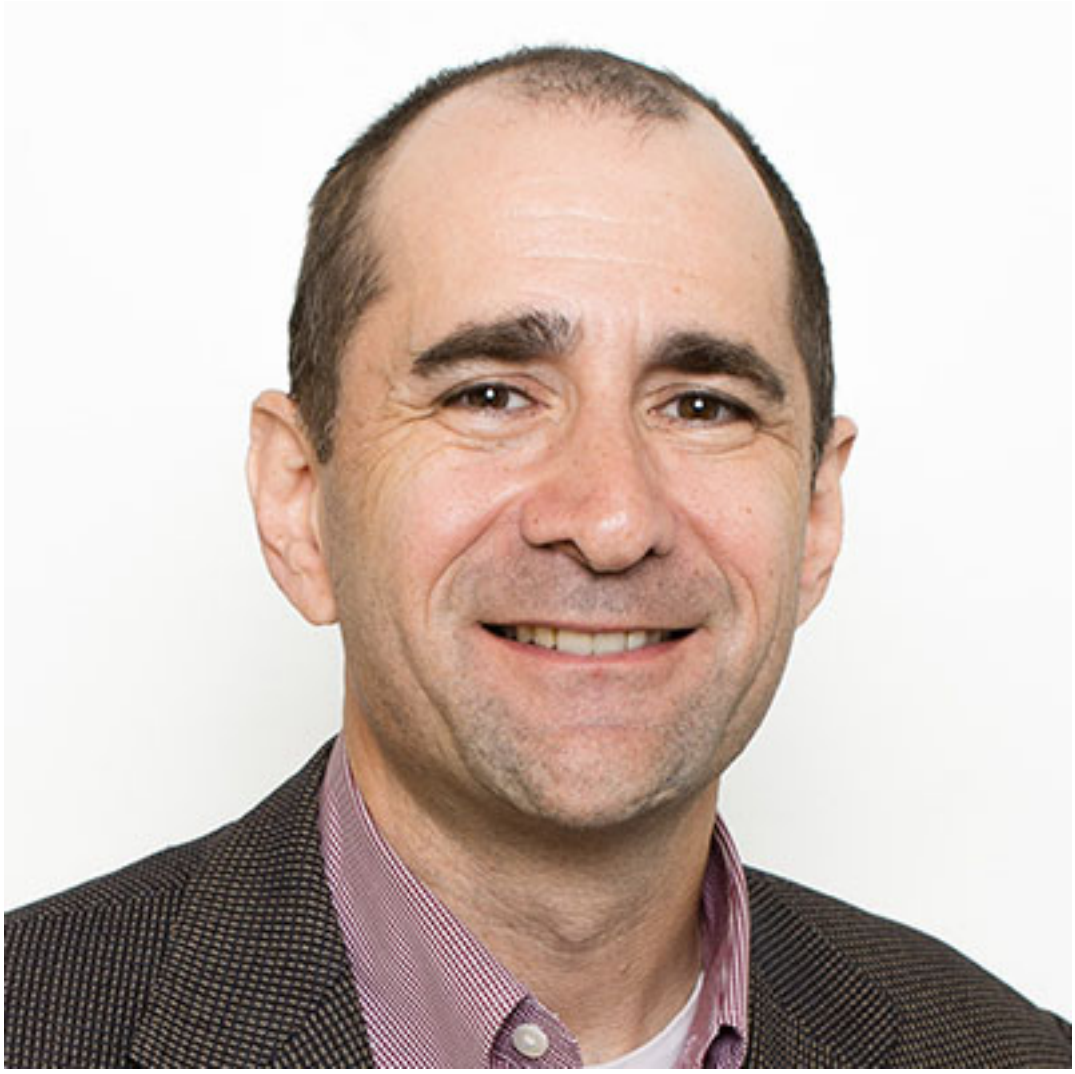
When working with your business colleagues to assess the value of your case, don’t forget about the value of keeping a particular matter private. To ensure a lack of publicity, settlement agreements stemming from a mediation often include non-disparagement and confidentiality provisions with substantial liquidated damages to be due upon violation of those provisions. Lastly, don’t forget the value of finality: What would your executives pay to stop worrying about the dispute, even on days they are not actively working on it?

## Resting your case

The majority of settlements involve sacrifice by both sides relative to the expectations. As counsel, you need to help your clients maintain the right perspective about any settlement reached in mediation.

If your client was excited to litigate and draw blood, remember to remind her about how she made the right decision for the company by reducing distractions for her colleagues. And if your client is having second thoughts about the cost of a settlement, don’t hesitate to revisit that case value analysis to put the settlement into more perspective for him.

## Neil Peretz



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Neil Peretz has served as general counsel of multiple companies, particularly in the financial services and technology industries, as well as a corporate CEO, CFO, and COO.

Outside of the corporate sphere, he co-founded the Office of Enforcement of the Consumer Financial Protection Bureau and practiced law with the US Department of Justice and the Securities and Exchange Commission. Peretz holds a JD from the University of California, Los Angeles (UCLA) School of Law, an LLM (master of laws) from Katholieke Universiteit Leuven (where he was a Fulbright Scholar), bachelor's and master's degrees from Tufts University, and has been ABD at the George Mason University School of Public Policy.

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