

# Partnering with In-House Counsel on Positioning Claims for Settlement

A Practical Guidance® Practice Note by  
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This practice note discusses issues outside counsel should consider when positioning claims for settlement in a case involving a corporate client. Specifically, this piece discusses the strategy for effectively timing settlement negotiations and practical guidance for having a productive mediation.

There are many opportunities for parties to reach a settlement, starting before a lawsuit is filed, and going from early in the litigation process, to the “courthouse steps,” and even through jury deliberation. If used effectively, mediation is a tool that parties can use to reduce litigation costs for both sides and reach an early resolution. When early resolution is not possible, the parties can still target discovery toward positioning the case in the direction of a favorable settlement at several stages of the litigation process.

For more on settlement, see [Settlement Fundamentals and Tactics \(Federal\)](#).

For more on partnering with in-house counsel, see [Partnering with In-House Counsel to Prepare Opening and Closing](#)

[Statements](#) and [Why You Should Include In-House Counsel in Trial Preparation from the Start](#).

## Approaching Settlement

The parties must approach resolution (whether informal or through a formal mediation process) with enough settlement authority either to resolve the matter or give the best reasonable efforts to resolve the matter. Not every matter, however, is truly resolvable through settlement. For example, cases may not be capable of settling because of the following:

- **Disagreement over liability.** If both parties disagree on who is responsible for the dispute, they may not be able to reach a settlement. In a car accident, for instance, each driver may blame the other for causing the crash.
- **Disagreement over damages.** Even if liability is clear, parties may disagree on the amount of damages owed. For example, in a personal injury case, one party may claim that their injuries are worth \$1 million, while the other party may believe that they are only worth \$100,000.
- **Lack of trust.** Sometimes, parties may not trust each other to negotiate in good faith. This may be due to past experiences or the belief that the other party is not being truthful.
- **Stakes are too high.** In some cases, the stakes may be too high for one or both parties to agree to a settlement. For example, a company facing a class-action lawsuit may be hesitant to settle for fear of setting a precedent that could lead to similar lawsuits in the future.
- **Principle.** Parties may be unwilling to settle due to a matter of principle. A party who feels they were wronged may refuse to settle for a lesser amount because they want to stand up for what they believe is right.

- **Emotional factors.** Emotions can sometimes play a role in legal disputes, making it difficult for parties to reach a settlement. A party who feels wronged may be angry and refuse to settle, even when it is in their best interest to do so.
- **Legal or strategic considerations.** Finally, parties may sometimes choose to go to trial due to legal or strategic considerations. For example, a party may believe that they have a stronger case in front of a judge and jury, or that going to trial will send a message to other potential litigants.

When issues become challenging, in-house counsel is in the best position to confer with the stakeholders and reach consensus within the company.

## Timing Considerations

In-house counsel must carefully consider the timing of negotiations, taking into account a variety of factors such as the strength of the case, the likelihood of a favorable outcome, and the amount of time and resources available to the company. In some cases, it may be necessary to engage in pre-litigation negotiations to explore the possibility of a settlement before a lawsuit is filed. In other matters, you may want to wait until the case is well underway before negotiating a settlement.

In-house counsel must also be mindful of the deadlines and limitations set by the law, such as statutes of limitations or discovery deadlines, which may impact the timing of negotiations. The right timing can greatly impact the outcome of the settlement, and in-house counsel must be attuned to the legal and practical implications of their negotiations to ensure that they are acting in the company's best interests.

As the voice of the company, in-house counsel can help to position a claim for settlement regardless of whether the funding of such settlement comes from the company or an insurer. Their top priority is to protect the interests of the company, a task that requires an intimate understanding of the company's goals, objectives, and risk tolerance. In-house counsel must have their finger on the pulse of the organization, enabling them to guide the negotiation process and make decisions that align with the company's overall strategy.

There's a common misconception that in-house counsel will do whatever it takes to reach a settlement in legal matters. However, the reality is that their authority may be limited, and they can only do as much as the company allows them to do. While in-house counsel is expected to attend settlement discussions with all the authority the company is willing to

give, this doesn't necessarily mean they have the authority to agree to anything.

It is essential to ensure that the limited authority of in-house counsel aligns with what the company would ultimately be willing to give. This means that they must have all the necessary information and resources to make the best possible decisions on behalf of the company.

In addition to their direct role in negotiations, in-house counsel plays a crucial role in managing the flow of information between the company and outside counsel. They are responsible for coordinating the work of both teams, ensuring that outside counsel has all the relevant information needed to provide sound advice on the company's options. This requires clear communication, effective teamwork, and a deep understanding of the company's goals and values.

### Tips for Outside Counsel

If the claim is assigned to outside defense counsel early in the process, it gives outside counsel the opportunity to develop the pre-suit negotiations in a manner to position cases toward settlement. Oftentimes, once a few letters are exchanged and/or a lawsuit is filed, tempers flare and parties become entrenched in their legal positions.

When a new claim is assigned, outside defense counsel should reach out quickly to the opposing side to discover basic information on the facts of the incident and what the other side is seeking in order to prevent a lawsuit being filed. For example, in a construction claim, outside counsel would generally want to learn if the project owner is seeking the contractor to diagnose the cause of damage, self-perform repairs, and/or pay a sum of money so the owner can hire an outside company to make the repairs. By learning this information quickly after a problem arises, outside defense counsel has an opportunity to "solve" the owner's problem before significant funds are spent by the owner's counsel and/or owner's experts. This benefits the contractor by avoiding a lawsuit, while also benefiting the owner by having the issue resolved quickly.

If investigation needs to be performed before a resolution can occur, then outside defense counsel has the opportunity to participate and help direct that investigation. For example, if there are HVAC complaints, then the owner's expert and outside defense counsel's expert can jointly prepare a testing protocol to evaluate the cause of HVAC issues, such as indoor humidity. Through each expert having a "say" in the testing protocol, the parties will be more aligned in their positions at an eventual mediation, instead of it being a battle of the experts.

Despite best efforts, an early resolution is not always possible. Through early discussions with the opposing side, outside defense counsel may learn that there are unrealistic expectations which will prevent a productive mediation. In those situations, it can be beneficial to require parties to engage in the litigation process. Sometimes, simply seeing the lawsuit papers provides extra motivation toward settlement; however, other key time frames for settlement negotiations include:

- After written discovery and document production are complete
- After expert reports are produced
- After favorable depositions of parties and/or experts
- Before there is a ruling on dispositive motion that has been filed –and–
- During the final weeks of preparation for trial and/or arbitration

In some lawsuits, multiple mediations might be helpful to learn what the opposing side needs in a settlement.

When selecting the timing of settlement negotiations, the most important factor is making sure that each side has the necessary information in order to productively engage in the conversation. Without that information, settlement will not occur.

## Informal Negotiations versus Formal Mediation

When a claim arises, there are different methods of negotiation, including:

- Discussions between parties without the presence of in-house or outside counsel
- Discussions between in-house counsel for the parties
- Exchanging offers and demands through outside counsel –and–
- Formal mediation

The use of informal negotiations instead of waiting for a more formal settlement process carries several risks. First, informal negotiations between parties without counsel involved lack the structure and framework of a formal settlement process, which can result in misunderstandings and miscommunication. Second, informal negotiations can lead to the premature resolution of a case, which may not fully consider all of the relevant issues and parties involved. This can result in an incomplete or unsatisfactory settlement that leaves open the possibility of further disputes in the future.

Additionally, informal negotiations do not exist as part of a legally binding process, which means that if the parties reach an agreement, it may not be enforceable in court—especially if done without the assistance of any counsel.

The ultimate goal is to reach a settlement that is favorable to the company, but it is important to remember that a successful settlement is one that is acceptable to both parties. When an insurer is involved, in-house counsel must be able to effectively balance the needs of the company with the needs of the insurer and find a solution that works for both sides.

Informal negotiations with insurers can be long and arduous, and in-house counsel must be prepared to invest the time and effort necessary to reach a favorable settlement. They must possess the patience and persistence to see negotiations through to the end, as well as the strategic thinking required to devise a comprehensive settlement strategy that balances the interests of the company and the insurer.

For outside counsel, it is important to evaluate whether a claim can be resolved through informal negotiations, or whether it requires the assistance of a mediator in a formal mediation. For low value claims and/or claims involving only two parties, it is possible to negotiate without the assistance of a mediator. This can be achieved through phone calls between counsel or exchanging offers and demands through emails and letters. If you reach a settlement in this manner, it is important to document the agreement in writing.

However, for more complicated claims, a mediator can assist in helping the parties negotiate and evaluate the relative strengths or weaknesses of their positions. Some factors to consider when deciding whether to use a mediator include the number of parties, the gap between the parties' assessment of damages, and the complexity of the issues. Generally, as the number of parties and amount of damages increase, then the chances of success increase through using a mediator instead of proceeding through informal negotiations.

## Preparing for Settlement Discussions

The primary relationship that in-house counsel must manage is the relationship between outside defense counsel and the company (regardless of whether this is paid for by an insurer or the company). Outside defense counsel will require significant assistance coordinating with the company on the production of documents and other physical evidence, management of witnesses, and getting settlement authority.

In-house counsel must have the ability to retrieve and manage documentation efficiently when it is required. This may involve utilizing electronic document management systems and navigating complex databases and information systems. They must also prioritize the security and confidentiality of all documentation, particularly when it contains sensitive or confidential information. This requires a high level of diligence and attention to detail to ensure that all documentation is kept safe and secure at all times.

Any time that insurance is involved, in-house counsel needs to determine whether coverage counsel should be engaged. Coverage counsel are useful beyond simple insurance coverage issues. Due to their constant involvement with insurance companies, coverage counsel build relationships with a variety of people within insurance companies, including the insurance adjusters who may be working the cases already and the insurance companies' coverage counsel issuing coverage opinions.

## Mediation

When scheduling a mediation, the most important factor to consider is whether both sides have the necessary factual information and documentation in order to evaluate both liability and damages. As to liability, it is recommended that outside defense counsel ask for a copy of all expert reports from the plaintiff, even if the reports are not finalized or are only used for mediation purposes. Additionally, outside defense counsel should request the opposing party's counsel to send a demand letter stating its versions of the facts. It may also be helpful for outside defense counsel to respond to the demand letter by stating defense counsel's perspective on the facts. This will allow both sides to see the evidence from the other party's perspective, which is what the jury will see if mediation is unsuccessful. If parties are learning new information for the first time on the day of mediation, then there will likely not be a successful resolution.

On the issue of damages, it is important that outside defense counsel receives a settlement demand, breakdown of the damages, and supporting damages documentation several months before mediation. In a construction project, damages can include several categories, such as:

- Repair costs
- Delay damages
- Diminution in value
- Contract balances
- Expert fees –and–
- Attorneys' fees

It is common that the parties will drastically disagree on the reasonable cost of repair. However, by exchanging the cost estimates well in advance of mediation, each side is able to discuss the risks with its experts. This prevents the parties from arguing blindly at mediation for their position without expert support.

Once outside defense counsel gets expert reports and proof of damages, there are several steps that need to be taken. These steps include discussing the documentation with defense experts, drafting a pre-mediation report to in-house counsel and/or insurance carriers, sending settlement demands to co-defendants if there are third-party claims and/or crossclaims, and getting settlement authority. If parties try to accomplish these steps shortly before mediation, then it is likely that a second mediation will be necessary before a resolution can occur.

It is important that co-defendants coordinate with each other in advance of mediation, including making sure that each "claimant" communicates a pre-suit demand.

## Settlement Authority

Outside defense counsel needs to have settlement authority from in-house counsel and/or the company's insurance carrier before the day of mediation. It is recommended that outside defense counsel submit a pre-mediation report at least 60 days before mediation. The pre-mediation report should include an analysis of the party roles, good and bad facts regarding the client's position, liability analysis, damages analysis, potential exposure at trial and/or arbitration, and a recommended settlement range for the claims. Although it is tempting to step into the role of a zealous advocate for your client, it is important that outside defense counsel communicates an accurate risk exposure early in the lawsuit so that later risk is not a surprise to in-house counsel.

Approximately two weeks before mediation, outside defense counsel should set up a conference call with all decision-makers, including in-house counsel and, if applicable, primary/excess insurance carriers. This is the opportunity for in-house counsel and carriers to ask outside defense counsel questions about the case, as well as for outside defense counsel to ensure that the decision-makers are focusing on the case and prepared to engage in discussions at mediation.

Before ending the call, outside defense counsel should ask the decision-maker(s) whether defense counsel has settlement authority. There should also be a discussion on the amount of authority, as well as whether outside defense counsel has discretion in making the individual moves at mediation. Transparency is a key element in this conversation both directions. It is important to remember that all cases do

not necessarily settle, nor are all cases ripe for settlement, but each party should be best positioned and prepared to make the best case for settlement.

### **Mediator Discussions**

The first time that a mediator gets information about the case should not be during mediation. It is important for outside defense counsel to send a position statement to the mediator at least one week before mediation. In addition, it is recommended that outside defense counsel has a phone call with the mediator in order to set the mediator's expectations before the mediator even steps in the room the day of mediation. For example, if the contractor's outside defense counsel knows that there is no insurance coverage, that needs to be communicated early to the mediator. That then allows the mediator to spend the weeks before mediation getting the owner's counsel prepared to expect a performance offer, instead of a money offer. If this is not done, then there will likely need to be a second mediation after parties have time to process the unexpected information.

### **Settlement Agreement**

Before stepping into a mediation, outside counsel should submit a proposed final settlement agreement to the mediator. This helps to ensure that the mediator is communicating key settlement terms to the opposing side, as well as preventing the settlement from falling apart after mediation if parties cannot agree on language in the settlement agreement. For large multiparty mediations, it

is also recommended that the settlement agreement be circulated among the parties' counsel before the day of mediation. This allows the parties to send revisions to the key settlement terms, and simply use the mediator for the money discussions.

In addition to exchanging a proposed settlement agreement, outside defense counsel should ensure that the mediator gets a signature from each party's counsel before counsel is allowed to leave mediation. When a party has multiple voices, such as in the example of a homeowners' association, it is possible for the person at mediation to agree to terms, which a later person then disagrees with. The same is also true when a party has multiple counsel representing it. By getting a signature on the agreement (instead of a verbal agreement), potential future issues are prevented.

For more on mediation, see [The Five Keys to a Productive Mediation](#).

## **Conclusion**

In this practice note, we have provided both perspectives, but the reality is that both in-house counsel and outside counsel are two parts of a unified team. They approach the matter with different views and expectations, which need to be solidified into one consolidated view and approach. By working together, in-house counsel and outside defense counsel can position cases toward a favorable resolution for the company.

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Heather also has experience in drafting contracts for design professionals and contractors at the beginning of projects, advising clients during ongoing construction projects when problems arise, and negotiating claims in order to help her clients avoid litigation.

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